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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 499

META BIDDLE ROBINETTE, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 500

ELISE BIDDLE PAUMGARTEN, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 29, 1942.

CERTIORARI GRANTED DECEMBER 7, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 499

META BIDDLE ROBINETTE, PETITIONER,

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1942.

—3694

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103009

META BIDDLE ROBINETTE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Henry A. Mulcahy, Esq.
For Comm'r: Eugene G. Smith, Esq.

DOCKET ENTRIES

1940

May 28. Petition received and filed. Taxpayer notified. Fee paid.

May 28. Copy of petition served on General Counsel.

Jul. 25. Answer filed by General Counsel.

Jul. 25. Request for hearing in Philadelphia filed by General Counsel.

Jul. 27. Notice issued placing proceeding on Philadelphia, Pa. calendar. Answer and request served.

Oct. 11. Hearing set Dec. 2, 1940 in Philadelphia, Pa.

Dec. 5. Hearing had before Mr. Sternhagen on the merits. Submitted. Motion to consolidate with docket 103010 granted. Stipulation as to the facts filed. Briefs due 1/20/41—reply 2/4/41.

Dec. 26. Transcript of hearing of 12/5/40 filed.

1941

Jan. 16. Motion for extension to Feb. 1, 1941 to file brief filed by General Counsel.

Jan. 21. Brief filed by taxpayer. (Signed copy rec'd 1/25/41.)

Jan. 30. Brief lodged by General Counsel.

Jan. 31. Motion for extension to Feb. 1, 1941 to file brief, filed by General Counsel granted to 1/31/41.

Feb. 1. Copy of brief served on General Counsel.

Feb. 4. Motion for extension to Feb. 18, 1941 to file reply brief filed by taxpayer. 2/5/41 granted.

Feb. 18. Reply brief filed by taxpayer.

Jun. 10. Findings of fact and opinion rendered, Sternhagen, Div. 10. Decision will be entered under Rule 50. 6/10/41 copy served.

Jun. 27. Computation of deficiency filed by General Counsel.

Jun. 30. Hearing set July 16, 1941 on settlement.

Jul. 2. Consent to settlement filed by taxpayer.

Jul. 8. Decision entered, Sternhagen, Div. 10.

Sept. 24. Petition for review by U. S. Circuit Court of Appeals, Third Circuit, filed by General Counsel.

Sept. 26. Proof of service filed.

Oct. 6. Proof of service filed.

Oct. 23. Motion for extension to 12/23/41 to prepare and transmit record filed by General Counsel.

Oct. 23. Order enlarging time to December 23, 1941 to prepare and transmit record entered.

Nov. 29. Statement of points filed by General Counsel, proof of service thereon.

Nov. 29. Agreed statement of evidence filed.

Nov. 29. Agreed designation of contents of record filed.

[fol. 1a] Dec. 3. Certified copy of order from Third Circuit consolidating for briefing, hearing, argument and decision upon a single consolidated transcript of record filed.

[fol. 2] [File endorsement omitted]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103009

[Title omitted]

PETITION—Filed May 28, 1940

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the notice of deficiency MT-ET-GT-1197-36-1st Pennsylvania, dated March 12, 1940, and, as a basis of her proceeding, alleges as follows:

1. The petitioner is an individual residing at No. 12 East Chestnut Avenue, Chestnut Hill, Philadelphia, Pennsylvania. The return for the period here involved was filed

with the Collector for the First District of Pennsylvania on March 15, 1937.

[fol. 3] 2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 12, 1940, as petitioner believes.

3. The taxes in controversy are gift taxes for the calendar year 1936, and in the amount of $3,155.57.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner of Internal Revenue erred in determining that the transfer made by petitioner of the corpus or principal of the Trust Indenture, dated January 14, 1936, constituted a taxable gift within the meaning of Section 501 of the Revenue Act of 1932, as amended.

b. The Commissioner of Internal Revenue erred in determining that the petitioner had relinquished *in praesenti* her title, dominion and control of the corpus or principal transferred under the Trust Indenture, dated January 14, 1936.

c. The Commissioner of Internal Revenue erred in his determination of the value of the property transferred under the Trust Indenture, dated January 14, 1936.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

[fol. 4] a. On January 14, 1936, petitioner executed an Indenture of Trust and conveyed certain property to others, as Trustees, to pay the income therefrom to petitioner for life, and, on her death, to others for their lives, and on termination of the life estates, to pay over and distribute the corpus or principal of the trust to the issue of the petitioner's daughter Elise Biddle Robinson. On the date of execution and creation of the trust, petitioner's daughter Elise Biddle Robinson was unmarried and without issue.

b. On January 14, 1936, the date of execution of the transfer in trust, there was no donee in existence to accept the purported gift, which acceptance is necessary to establish a gift *inter vivos*.

c. The Trust Indenture provides that, in default of issue of petitioner's daughter Elise Biddle Robinson, the corpus

or principal of the trust is to be paid and distributed to such persons, in such proportions, and for such estates as petitioner, or Edward B. Robinette, or Elise Biddle Robinson, whichever of said three shall be the survivor, may by Last Will and Testament appoint.

d. The power of appointment reserved by petitioner negatives the relinquishment *in praesenti* of dominion and control of the corpus or principal necessary to establish the purported gift *inter vivos*.

e. The transfer made by petitioner under the Trust Indenture, dated January 14, 1936, did not constitute an absolute and complete *inter vivos* transfer *in praesenti* within the meaning of Section 501 of the Revenue Act of 1932, as amended:

f. The valuation of the property transferred by petitioner in trust on January 14, 1936, as determined by the Commissioner of Internal Revenue did not constitute the fair market value thereof on date of transfer.

[fol. 5] Wherefore, petitioner prays that this Board may hear the proceedings and determine:

1. That the transfer in trust made by petitioner by Indenture, dated January 14, 1936, is not a gift taxable to petitioner.

2. That there is no deficiency in gift tax owed by petitioner for the calendar year 1936.

3. That the petitioner has overpaid her gift taxes for the calendar year 1936; and that the recovery of such overpayment is not barred by the Statute of Limitations.

4. Such other and further relief as this Board may deem just and proper.

Henry A. Mulcahy, Counsel for Petitioner, 50 Broadway, New York City, New York.

[fol. 6] *Duly sworn to by Meta Biddle Robinette. Jurat omitted in printing.*

[fol. 7] EXHIBIT "A" TO PETITION

March 12, 1940.

MT-ET-GT-1197-36-1st Pennsylvania
Donor—Meta Biddle Robinette

Meta Biddle Robinette,
12 East Chestnut Avenue,
Chestnut Hill, Philadelphia, Pa.

DEAR MADAM:

You are advised that the determination of your gift tax liability for the calendar year 1936 discloses a deficiency of $3,155.57, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Philadelphia, Pa., for the attention of the Chief Estate Tax Officer. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, which ever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by ——— ———, Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver.

[fol. 8] Donor—Meta Biddle Robinette
Year of Gift—1936

Statement

$193,546.00 (value of property transferred) x .53931, remainder factor for age 55 = $104,381.24, value of gift.

	Reversed	Recommended	Adjustment
Total gifts, 1936	$ 0.00	$37,000.00	$104,301.29
Less exclusions	0.00	0.00	0.00
Amount included	0.00	37,000.00	104,301.29
Less specific exemption	0.00	40,000.00	40,000.00
Net gifts, 1936	$ 0.00	$37,000.00	$64,301.29
Tax on net gifts	$ 0.00	$300.75	$3,344.32
Increase (additional deficiency)			$3,193.57

[fol. 9] [File endorsement omitted]

UNITED STATES BOARD OF TAX APPEALS

Docket No. 103009

[Title omitted]

ANSWER—Filed July 25, 1940

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.

2. Admits the allegations of paragraph 2 of the petition.

3. Admits the allegations of paragraph 3 of the petition.

4. a, b, c Denies the allegations of paragraphs 4 a, b, and c of the petition.

5. a. Admits that on January 14, 1936, the petitioner executed an Indenture of Trust and conveyed certain property to trustees; denies the remaining allegations of paragraph 5 a of the petition.

b to f. Denies the allegations of paragraphs 5 b to f, inclusive, of the petition.

6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified or denied.

[fol. 10] Wherefore, it is prayed that the petition be denied.

(Signed) J. P. Wenchel, A., Chief Counsel, Bureau of Internal Revenue.

Of Counsel: Hartford Allen, Division Counsel; Eugene G. Smith, Special Attorney, Bureau of Internal Revenue.

[fol. 11]. Before United States Board of Tax Appeals

Docket No. 103009

[Title omitted]

Agreed Statement of Facts—Filed December 5, 1940

It Is Hereby Stipulated and Agreed by and between the petitioner and the respondent, by their respective counsel, that the following facts shall be taken as true for the purposes of the above entitled proceeding, with leave to either party to introduce other and further evidence not inconsistent with the facts herein stipulated:

1. The petitioner is an individual residing in Philadelphia, Pennsylvania. On January 14, 1936, the date petitioner executed the Indenture of Trust hereinafter described, she was fifty-five (55) years of age. . .

2. That on January 14, 1936, the petitioner, as Grantor, and The Pennsylvania Company for Insurances on Lives and Granting Annuities, Edward B. Robinette, and George Earle Robinette, all of the City of Philadelphia, Pennsylvania, as Trustees, entered into an irrevocable Indenture of [fol. 12] Trust, a true copy of which is attached hereto and made a part hereof, marked Exhibit "A".

3. That on January 14, 1936, the petitioner, pursuant to the provisions of the Indenture of Trust, assigned, transferred and set over unto the Trustees the property set forth in Schedule A annexed to and made a part of said Indenture, of the then market value of $193,546.00.

4. Under the terms of the Trust Indenture, the Trustees are to pay the entire income from the trust to the petitioner during her life, and on her death to pay over and distribute the net income monthly to Edward B. Robinette, her husband, and on his death to pay the net income monthly to Elise Biddle Robinson, her daughter, for the term of her natural life.

5. Under the terms of the Trust Indenture, the Trustees are directed, on the termination of the life estates aforementioned, to pay over and distribute the corpus or principal of the trust to the issue of Elise Biddle Robinson, to be divided among such issue *per stirpes* upon the attainment

by such issue, respectively, of the full age of twenty-one (21) years, and, in default of issue of Elise Biddle Robinson, then to such persons, in such proportions, and for such estates as petitioner, or Edward B. Robinette, or Elise Biddle Robinson, whichever of said three shall be the survivor, may, by Last Will and Testament duly proved and allowed, direct, limit and appoint.

[fols. 13-14] 6. On January 14, 1936, the date of the creation and execution of the aforementioned trust, Elise Biddle Robinson was thirty (30) years of age, unmarried and without issue.

7. The petitioner on March 15, 1937, filed a gift tax return for the calendar year 1936 in the office of the Collector of Internal Revenue for the First District of Philadelphia, Pennsylvania. The return filed by the petitioner disclosed the execution of the Trust Indenture on January 14, 1936, and disclaimed any gift tax liability thereunder.

8. Upon audit of said gift tax return, the respondent determined that a gift occurred as to the life estates transferred to Edward B. Robinette and Elise Biddle Robinson. Said life estates were valued at $57,958.40, which resulted in a deficiency tax of $388.75. Petitioner paid the alleged additional tax.

9. Thereafter and on or about March 12, 1940, the respondent, by a ninety-day letter, notified the petitioner of his determination that a gift occurred on January 14, 1936, as to the remainder interest under the trust, thereby resulting in an additional deficiency in tax of $3,155.57. The value of the remainder was fixed at $104,381.29, after applying the remainder factor .53931 for age 55 to the value of the property transferred. A true copy of said deficiency letter is attached to the petition herein, and by reference made a part hereof.

(Signed) Henry A. Mulcahy, Counsel for Petitioner.
(Signed) J. P. Wenchel-a, Chief Counsel, Bureau of Internal Revenue.

[fol. 15] EXHIBIT "A" TO AGREED STATEMENT OF FACTS

This Indenture, made this 14th day of January, 193-, by and between Meta Biddle Robinette, hereinafter called "Grantor", and The Pennsylvania Company For Insur-

ances On Lives And Granting Annuities, a corporation, and Edward B. Robinette and George Earle Robinette, hereinafter collectively called "Trustees", all of the City of Philadelphia, Pennsylvania.

Witnesseth:

That Grantor for and in consideration of the sum of One Dollar ($1.00) unto her in hand paid by Trustees at and before the ensealing and delivery hereof, receipt whereof is hereby acknowledged, and of the covenants and agreements herein contained, does hereby assign, transfer and set over unto Trustees, their successors and assigns, the items set forth in Schedule "A" hereto annexed and made a part hereof, together with such other sums of money, securities, life insurance policies or other property, real or personal, as may be delivered to Trustees or assigned or conveyed to them or their successors, or assigns by endorsement hereon or as may be otherwise by proper instrument or instruments, placed under the trust hereby created.

To Have And To Hold, receive and take such items set forth in said Schedule "A" or as may be hereafter delivered to Trustees or assigned or conveyed to them, their successors and assigns, *in trust*, nevertheless, for the following uses and purposes, and subject to all the terms hereof, viz:

In Trust, to hold, manage, invest, reinvest and keep invested the corpus or principal thereof in such manner as Trustees in their discretion shall deem proper, pursuant to the provisions hereof, as more particularly hereinafter set forth and not in limitation of the usual powers of Trustees, but in addition thereto, and to demand, collect and receive the interest, dividends, earnings and income therefrom and after the deduction of all proper or necessary charges or expenses, to pay over the net income therefrom [fol. 16] monthly for my account unto Edward B. Robinette and George Earle Robinette jointly, and upon the death of either, then unto the survivor alone, whom I hereby appoint as my Attorneys-in-Fact to collect and receipt for said net income, hereby ratifying and confirming all that my said attorneys or attorney shall lawfully do by virtue hereof. Notwithstanding the foregoing provision, I, the Grantor, reserve the right upon the death of both my Attorneys-in-Fact herein named, to constitute and appoint one or more Attorneys-in-Fact, to collect and receipt for said

net income, and my Trustees are hereby authorized to pay the same over to the person or persons so constituted and appointed by me and to take his or their receipt therefor.

In further trust, upon the death of Grantor, to pay over and distribute said net income monthly unto Edward B. Robinette, husband of Grantor, for the term of his natural life, and upon his death, to pay over and distribute said net income monthly to Elise Biddle Robinson, daughter of Grantor, for the term of her natural life.

In further trust, upon the death of Grantor, and upon the death of the survivor of said Edward B. Robinette and Elise Biddle Robinson, to pay over and distribute the corpus or principal of the trust hereby created, together with all accumulations thereon and additions thereto, to the issue of the said Elise Biddle Robinson, to be divided among such issue, per stirpes and not per capita, upon the attainment by such issue respectively, of the full age of twenty-one (21) years, with power to apply the distributive share of any minor distributee directly for the comfort, education, maintenance and support of such minor distributee without the intervention of any guardian; and in default of issue of the said Elise Biddle Robinson, then unto such persons, in such proportions and for such estates as Grantor or Edward B. Robinette or Elise Biddle Robinson, whichever of said three shall be the survivor, may, by Last [fol. 17] Will and Testament, duly proved and allowed, direct, limit and appoint.

The Trustees shall have the following powers and authority with respect to their management of the Trust, thereby created:

To retain any and all investments or other properties conveyed hereunder so long as Trustees shall deem proper and for the best interest of the trust estate hereby created and at any time or times to sell, dispose of and make valid transfer of the securities forming a part of the trust hereby created, and to invest the proceeds thereof from time to time in such stocks, securities and real estate as to them may seem proper, with due regard for the safety of the principal and a reasonable return of income therefrom, without confining Trustees to what are known as "legal investments" for trustees under the laws of the Commonwealth of Pennsylvania, and also to continue to sell and dispose of and transfer investments and reinvestments and reinvest the proceeds under like ample power, provided,

however, that so long as Edward B. Robinette and George Earle Robinette shall continue as Trustees hereunder, all sales of investments or other property and all investments and reinvestments and purchases of other property shall be subject to the absolute discretion of said Edward B. Robinette and said George Earle Robinette, to be exercised jointly by direction in writing signed by both and filed with the corporate Trustee herein named, and without liability to such corporate Trustee for acting according to such written direction. The term "securities" wherever used in this Indenture shall include shares of stock, common and/or preferred of any corporation.

To purchase investments and securities as aforesaid at a premium and to deduct such premium from income.

To sell, lease, mortgage, exchange or otherwise dispose of any or all of the real property, part of the Trust Fund, without application to any Court for permission so to do. Trustees shall have full power and authority to make, execute, acknowledge and deliver good and sufficient deeds, leases, mortgages, bills of sale, assignments or other instruments, whether under seal or otherwise, which Trustees [fol. 18] may deem necessary or expedient.

No mortgage, pledgee, assignee, vendee or other grantee of any part or all of Trust Fund shall be bound to see to the application or disposition of the proceeds thereof or to inquire into the validity, expediency or propriety thereof, or be affected by anything which the Trustees may do or omit to do or suffer to be done with respect to such proceeds.

To pay any and all interest or other charges on all or any part of the Trust Fund; to make any and all repairs and replacements necessary with respect thereto; and to insure the same against fire, theft or other casualty.

To cause the securities which may from time to time be in the Trust Fund to be registered in their names as Trustees or in the name of any nominee, or may keep the same in the name or names in which registered when received by Trustees.

To consent to the recapitalization, reorganization, consolidation or merger of any corporation, or to the sale or lease of its property or any portion thereof; or to the lease to it of any property; or to its dissolution; to deposit shares of stock and bonds held hereunder or exchange the same for the securities issued in connection with such corporate

action upon such terms and conditions as Trustees shall deem proper; pay all such assessments, subscriptions and other sums of moneys as Trustees may deem expedient for the protection of their interests as holder of any stocks, bonds, or securities of any other corporation; exercise any option contained in any stocks, bonds or securities for the conversion of the same into other securities, or to take advantage of any right to subscribe for stocks, bonds or securities; and generally exercise in connection with all such stocks, bonds or securities all rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right; provided, however, that [fol. 19] these powers shall not impose any obligation upon the Trustees to do any of the acts aforementioned.

To employ counsel and agents and determine and pay them reasonable compensation. Trustees shall be entitled to reimbursement for the same and for such other expenses and charges as Trustees may deem necessary and proper to incur in connection with the administration of the trust, such amounts to be charged against income.

To pay any and all taxes which may properly become payable, from time to time, under the Laws of the United States or of any State, County or Municipality, on the Trust Fund or any part thereof, or for any transfer thereof or transfer affecting the same, and to affix and cancel tax stamps in accordance with the provisions of such laws.

Whenever under any of the provisions of this instrument the exercise of judgment or discretion by the Trustees becomes necessary or proper, any such exercise of judgment or discretion, if made in good faith, shall be final and conclusive and shall bind all persons interested in the trust estate, as then constituted, and shall be subject to review by no court or other authority.

Trustees shall not be required to give any bond or other security for the faithful performance of the duties of such Trustees hereunder, any law or rule of court now or hereafter in force to the contrary notwithstanding.

Trustees may, but shall not be required so to do, set aside any part of the Trust Fund as a Sinking Fund to retire or absorb the premium on any securities taken or purchased for the Trust Fund at a premium.

All stock dividends, and all other distributions of surplus made in any medium except cash that are received by Trus-

tees upon or in respect of any shares of stock of a corporation held in the Trust Fund, shall be deemed to be income [fol. 20] if distributed by such corporation periodically and in the nature of a regular distribution of surplus by such corporation wholly or partly in lieu of cash dividends. In all other cases the same shall be received and held by Trustees as a part of the principal of the Trust Fund, so far as legally permissible.

Trustees may give proxies and powers of attorney on shares held in the trust to any person or persons selected by them.

In case of the death or resignation of either Edward B. Robinette or George Earle Robinette, the other shall alone continue to exercise the discretion to direct sales and investments hereinabove granted. In case of the death or resignation of both said individual Trustees, one or more individual Trustees may be appointed by written instrument signed by the Grantor, and Edward B. Robinette and Elise Biddle Robinson, or such of them as shall be living at the time of such appointment, and such written instrument may continue or may remove or may in any way limit the discretionary powers of direction granted to the individual Trustees herein named.

In case of the resignation as Trustee of The Pennsylvania Company for Insurances on Lives and Granting Annuities, said persons or so many of them as shall be living at the time of such resignation, may, by instrument in writing, appoint a new corporate Trustee which shall be a Trust Company in either Philadelphia or New York.

All directions of every sort or kind for the payment by Trustees of income shall be taken and made upon the express direction in each and every case that the person so receiving income under this deed shall take such income to which he or she shall be entitled and also that the principal or corpus of the fund held in trust hereunder shall be so [fol. 21] held that such principal and income shall be free and clear of the debts, contracts, engagements, alienations, assignments and anticipations of each and every of the beneficiaries and free and clear from the lien of judgments recovered against any of them, and free from liability for all levies, judgments, executions and sequestrations issued against any such *cestuis que trustent*.

In Witness Whereof, Grantor has hereunto set her hand and seal the day and year first above written.

Meta Biddle Robinette (L. S.)

Signed, sealed and delivered in the presence of: C. W. Leon, Jr., Thomas A. Carlin.

Edward B. Robinette, George Earle Robinette and The Pennsylvania Company for Insurances on Lives and Granting Annuities accept the trust hereinbefore set forth and acknowledge receipt of the securities set forth in Schedule "A" hereto annexed this 21 day of January, A. D., One Thousand Nine Hundred and Thirty-Six.

Edward B. Robinette, George Earle Robinette, The Pennsylvania Company For Insurance On Lives And Granting Annuities. By ——.

[fols. 22-25] STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On the 14th day of January, A. D., 1936, before me, the subscriber, a Notary Public in and for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, personally appeared Meta Biddle Robinette, Grantor as aforesaid, who, in due form of law, acknowledged the foregoing Deed of Trust to be her act and deed and desired that the same might be recorded as such.

Witness, my hand and notarial seal the day and year first above written.

Bella Fox, Notary Public. My Commission Expires March 6, 1939. (Seal.)

Schedule "A" to Exhibit "A" omitted in printing.

[fol. 26] BEFORE UNITED STATES BOARD OF TAX APPEALS

META BIDDLE ROBINETTE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ELISE BIDDLE PAUMGARTEN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 103009, 103010. Promulgated June 10, 1941

By the creation of a trust whereby the income is to be paid to the settlor for life, then to two others for life, the property then to go to children, if any, when they reach twenty-one, or, if none, then to testamentary appointees of the settlor, *held*, the settlor is not subject to gift tax upon the value of the remainder.

Henry A. Mulcahy, Esq., for the petitioners.
Eugene G. Smith, Esq., for the respondent.

Findings of Fact and Opinion—June 10, 1941

The Commissioner determined gift tax deficiencies for 1936 of $3,155.57 as to Meta Biddle Robinette, and $25,044.94 as to Elise Biddle Paumgarten, by taxing certain remainder interests as gifts.

FINDINGS OF FACT

Elise Biddle Paumgarten was, before her marriage, Elise Biddle Robinson. She is the daughter of Meta Biddle Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a

concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan, the trust indentures were executed on January 14, [fol. 27] 1936, by the mother and daughter in the presence of all three. The stepfather's will had been executed shortly before.

Petitioner Meta Biddle Robinette, who was then fifty-five years old, executed an irrevocable trust indenture, the Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette, and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $193,546. The trustees were to pay the entire income to the grantor during her life, and on her death to her husband monthly, and on his death, to her daughter monthly for life. Upon the termination of the life estates, the trustees were to distribute the corpus to the issue of the daughter *per stirpes*, upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons, in such proportions, and for such estates as the survivor of the three should by will appoint.

At the same time, this petitioner executed a revocable trust indenture the provisions of which were the same as those of the irrevocable trust, and she transferred to the trustees certain securities.

Petitioner Elise Biddle Robinson, who was then 30 years old, executed an irrevocable trust indenture, the Girard Trust Co., Edward B. Robinette, and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $680,928.68. The trustees were to pay the entire income from the trust to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either, to the survivor. Upon termination of the life estates, the trustees were to distribute the corpus to the issue of the grantor *per stirpes*, upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons, and in such proportions, and for such estates as the survivor of the three should by will appoint. Elise Biddle Robinson was married in April of 1936 and now has issue.

At the same time, this petitioner executed an irrevocable trust indenture, the Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette, and George Earle Robinette being the trustees. The terms were identical with the Girard trust aforementioned, except as to the amount and classification of the properties. To the trustees she transferred property having a market value of $216,709.16. At the same time, she executed a revocable trust indenture to the same trustees, with the same provisions as the irrevocable trust, and transferred certain securities to the trustees.

The petitioners' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures, of January 14, 1936, and claimed there was no gift tax liability.

[fol. 28] The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at $57,958.40, and assessed a tax of $388.75 against her, which she paid about January 29, 1940. The Commissioner determined that the life estates transferred to the mother and stepfather were gifts by Elise Biddle Robinson, valued them at $48,635.52, and assessed a tax of $129.53 against her, which she paid about January 29, 1940.

Thereafter, the respondent issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 14, 1936, were gifts, and determining an additional deficiency of $3,155.57 against Meta Biddle Robinette and $25,044.94 against Elise Biddle Robinson.

The value of the remainder in the Meta Biddle Robinette trust was fixed by respondent at $104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by respondent at $274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred.

Opinion

STERNHAGEN:

As to each petitioner, the Commissioner has determined a gift tax measured by the computed value of the remainder interest after the several life estates. The life estates

succeeding that of the settlor have been treated and taxed as gifts, and that is not in issue. The remainder was to go to Elise's children upon their attaining the age of twenty-one, respectively; and, if no children, then to the appointee by will of the survivor of the three, the daughter, her mother, and her stepfather. Thus, as to each grantor, there was a possible power of testamentary disposition of the remainder—a power as substantial as a reversion would be. If, for example, Elise, being thirty and unmarried when her trust was created, should fail to have children and should survive her mother and stepfather, both of whom were substantially older, she would have a power of testamentary appointment. Because of this retained interest, whether vested or contingent, the trust property would be included in her gross estate subject to estate tax. She had not so completely disposed of the property by means of the trust as to avoid the estate tax. *Helvering* v. *Hallock*, 309 U. S. 106. Until children were born, as they were, the settlor still had a possible power of disposition of the remainder, which is one of the most important attributes of ownership. Upon her death, if there were no issue, her testamentary power of appointment would be exercised if she were the last survivor, or that power would be freed [fol. 29] in the hands of her surviving mother or stepfather. So, when she created the trust she retained an interest in the property sufficient to warrant the expectation that it would be included in her gross estate upon her death.

According to *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, the gift tax is a supplement to the estate tax. A transfer is to be taxed as a gift when it becomes complete and not while the transferor retains substantial control of the property. *Burnet* v. *Guggenheim*, 288 U. S. 280; *William J. McCormack*, 43 B. T. A. 924; *Carl J. Schmidlapp*, 43 B .T. A. 829; *Lorraine Manville Gould Dresselhuys*, 40 B. T. A. 30. Since in the event of death of the settlor the trust property would be included within her gross estate and subjected to estate tax, this is strong reason for denying a gift tax at the time of the transfer in trust. The creation of the life interests, it must be remembered, has been recognized as the occasion for the imposition of the gift tax upon the value of the secondary life interests; and it is only as to the remainder after the extinction of all the life interests that the present question is raised. Cer-

tainly if it could have been known that there would be no children and that the grantor would be the ultimate survivor of the three, she could not have been taxed upon the creation of the remainder, which was entirely subject to her testamentary power of disposition. The determination of the Commissioner is reversed.

The petitioners argue also that they may not be taxed upon the value of the remainders because there were no donees in existence, and that they may not be taxed as upon gifts because the creation of the trusts was a reciprocal arrangement each in consideration of the other. These questions do not require decision.

Decision will be entered under Rule 50.

[fol. 30] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103009

META BIDDLE ROBINETTE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION—July 8, 1941

Subsequent to the Board's report, promulgated June 10, 1941, the respondent filed a computation which the petitioner agrees is in accordance with the said report. It is, therefore,

Ordered and Decided that there is no deficiency in gift tax for 1936.

Enter.

Entered July 8, 1941.

(S.) J. M. Sternhagen, Member.

[fol. 31] [File endorsement omitted]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

B. T. A. No. 103009

[Title omitted]

PETITION FOR REVIEW—Filed September 24, 1941

Guy T. Helvering, United States Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Third Circuit to review the decision entered by the United States Board of Tax Appeals on July 8, 1941, ordering and deciding that there is no gift tax due from Meta Biddle Robinette, respondent on review, for the calendar year 1936. This petition for review is filed pursuant to the provisions of Section 1141 and Section 1142 of the Internal Revenue Code.

Meta Biddle Robinette, respondent on review, filed her gift tax return for the year 1936 with the Collector of Internal Revenue for the First Pennsylvania District at Philadelphia, Pennsylvania, the office of which Collector is within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit.

(S.) Samuel O. Clark, Jr., Assistant Attorney General; (Signed) J. P. Wenchel CAR, Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner.

VFW/mer 8/16/41.

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

B. T. A. No. 103009

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed September 26, 1941

To Henry A. Mulcahy, Esq., 30 Broadway, New York, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 24th day of September, 1941, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 2nd day of September, 1941.

(Signed) B. D. Gamble, Clerk, United States Board of Tax Appeals.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 25th day of September, 1941.

(S.) Henry A. Mulcahy, Attorney for Respondent on Review.

VFW/mer 8/16/41.

[fols. 33-67] [File endorsement omitted]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

B. T. A. No. 103009

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed October 6, 1941

To Meta Biddle Robinette, 12 E. Chestnut Avenue, Chestnut Hill, Philadelphia, Pa.:

You are hereby notified that the Commissioner of Internal Revenue did, on the 24th day of September, 1941, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 2nd day of September, 1941.

(Signed) J. P. Wenchel, CAR, Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 29th day of September, 1941.

(Sgd) Meta Biddle Robinette, Respondent on Review.

VFW/mer 8/16/41.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

B. T. A. Docket No. 103009

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review,

v.

META BIDDLE ROBINETTE, Respondent on Review

B. T. A. Docket No. 103010

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review,

v.

ELISE BIDDLE PAUMGARTEN, Respondent on Review

CORAM: BIGGS and MARIS, JJ.:

ORDER OF CONSOLIDATION—December 1, 1941

Now on consideration of the joint motion filed herein by counsel for the respective parties to the above-entitled proceedings, it is

Ordered, that the above-entitled proceedings be and they are hereby consolidated for briefing, hearing, argument, and decision upon a single consolidated transcript of record to be certified and transmitted to this Court by the Clerk of the United States Board of Tax Appeals.

It is further ordered that the Clerk of this Court transmit to the Clerk of the United States Board of Tax Appeals a certified copy of this order to be by him incorporated in the record on review as certified and transmitted by him to this Court.

Enter.

For the Court, John Biggs, Jr., Circuit Judge.

[File endorsement omitted.]

[fol. 69] Clerk's Certificate to foregoing order omitted in printing.

[fol. 70] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103010

ELISE BIDDLE PAUMGARTEN, Formerly Known as ELISE BIDDLE ROBINSON, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Henry A. Mulcahy, Esq.
For Comm'r: Eugene G. Smith, Esq.

DOCKET ENTRIES

May 28. Petition received and filed. Taxpayer notified. Fee paid.
" 28. Copy of petition served on General Counsel.
Jul. 25. Answer filed by General Counsel.
" 25. Request for hearing in Philadelphia filed by General Counsel.
Aug. 1. Notice issued placing proceeding on Philadelphia calendar. Answer and request served.
Oct. 11. Hearing set Dec. 2, 1940 in Philadelphia, Pa.
Dec. 5. Hearing had before Mr. Sternhagen on the merits. Submitted. Motion to consolidate with docket 103009 granted. Stipulation as to the facts filed. Briefs due 1/20/41—reply 2/4/41.
" 26. Transcript of hearing of 12/5/40 filed.
1941
Jan. 16. Motion for extension to Feb. 1, 1941 to file brief filed by General Counsel.
" 21. Brief filed by taxpayer.
" 30. Brief lodged by General Counsel.
" 31. Motion of Jan. 16, 1941 to file brief, filed by General Counsel granted to 1/31/41.
Feb. 1. Copy of brief served on General Counsel.
" 4. Motion for extension to Feb. 18, 1941 to file reply brief filed by taxpayer. 2/5/41 granted.
" 18. Reply brief filed by taxpayer.
Jun. 10. Findings of fact and opinion rendered, Sternhagen, Div. 10. Decision will be entered under Rule 50. 6/10/41 copy served.

" 27. Computation of deficiency filed by General Counsel.
" 30. Hearing set July 16, 1941 on settlement.
Jul. 2. Consent to settlement filed by taxpayer.
" 8. Decision entered, Sternhagen, Div. 10.
Sep. 24. Petition for review by U. S. Circuit Court of Appeals, Third Circuit, filed by General Counsel.
" 26. Proof of service filed.
Oct. 6. Proof of service filed.
" 23. Motion for extension to Dec. 23, 1941 to prepare and transmit record filed by General Counsel.
" 23. Order enlarging time to Dec. 23, 1941 to prepare and transmit record entered.
Nov. 29. Statement of points filed by General Counsel with proof of service thereon.
" 29. Agreed statement of evidence filed.
" 29. Agreed designation of contents of record filed.
[fol. 70a]
1941
Dec. 3. Certified copy of order from Third Circuit consolidating for briefing, hearing, argument and decision upon a single consolidated transcript of record filed.

[fol. 71] [File endorsement omitted]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103010

[Title omitted]

PETITION—Filed May 28, 1940

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the notice of deficiency MT-ET-GT-1198-36-1st Pennsylvania, dated March 12, 1940, and, as a basis of her proceeding, alleges as follows:

1. The petitioner is an individual residing at No. 12 East Chestnut Avenue, Chestnut Hill, Philadelphia, Pennsylvania. The return for the period here involved was filed with the Collector for the First District of Pennsylvania on March 15, 1937.

[fol. 72] 2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 12, 1940, as petitioner believes.

3. The taxes in controversy are gift taxes for the calendar year 1936, and in the amount of $25,044.94.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner of Internal Revenue erred in determining that the transfer made by petitioner of the corpus or principal of the Trust Indenture, dated January 14, 1936, constituted a taxable gift within the meaning of Section 501 of the Revenue Act of 1932, as amended.

b. The Commissioner of Internal Revenue erred in determining that the petitioner had relinquished *in praesenti* her title, dominion and control of the corpus or principal transferred under the Trust Indenture, dated January 14, 1936.

c. The Commissioner of Internal Revenue erred in his determination of the value of the property transferred under the Trust Indenture, dated January 14, 1936.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

[fol. 73] a. On January 14, 1936, petitioner executed an Indenture of Trust and conveyed certain property to others, as Trustees, to pay the income therefrom to petitioner for life, and, on her death, to others for their lives, and on termination of the life estates, to pay over and distribute the corpus or principal of the trust to the issue of the petitioner. On the date of execution and creation of the trust, the petitioner was unmarried and without issue.

b. On January 14, 1936, the date of execution of the transfer in trust, there was no donee in existence to accept the purported gift, which acceptance is necessary to establish a gift *inter vivos*.

c. The Trust Indenture provides that, in default of issue of petitioner, the corpus or principal of the trust is to be paid and distributed to such persons, in such proportions, and for such estates as petitioner, or Edward B. Robinette,

or Meta Biddle Robinette, whichever of said three shall be the survivor, may by Last Will and Testament appoint.

d. The power of appointment reserved by petitioner negatives the relinquishment *in praesenti* of dominion and control of the corpus or principal necessary to establish the purported gift *inter vivos*.

e. The transfer made by petitioner under the Trust Indenture, dated January 14, 1936, did not constitute an absolute and complete *inter vivos* transfer *in praesenti* within the meaning of Section 501 of the Revenue Act of 1932, as amended.

f. The valuation of the property transferred by petitioner in trust on January 14, 1936, as determined by the Commissioner of Internal Revenue did not constitute the fair market value thereof on date of transfer.

[fol. 74] Wherefore, petitioner prays that this Board may hear the proceedings and determine:

1. That the transfer in trust made by petitioner by Indenture, dated January 14, 1936, is not a gift taxable to petitioner.

2. That there is no deficiency in gift tax owed by petitioner for the calendar year 1936.

3. That the petitioner has overpaid her gift taxes for the calendar year 1936; and that the recovery of such overpayment is not barred by the Statute of Limitations.

4. Such other and further relief as this Board may deem just and proper.

Henry A. Mulcahy, Counsel for Petitioner, 50 Broadway, New York City, New York.

[fol. 75] *Duly sworn to by Elise Biddle Paumgarten. Jurat omitted in printing.*

[fol. 76] EXHIBIT "A" TO PETITION

March 12, 1940.

MT-ET-GT-1198-36-1st Pennsylvania
Donor—Elise Biddle Robinson

Elise Biddle Robinson, 12 E. Chestnut Avenue, Chestnut Hill, Philadelphia, Pa.

Dear Madam:

You are advised that the determination of your gift tax liability for the calendar year 1936 discloses a deficiency of $25,044.94, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Philadelphia, Pa., for the attention of the Chief Estate Tax Officer. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by ——— ———, Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver. dmu.

[fol. 77] Donor, Elise Biddle Robinson. Year of Gift, 1936

Statement

$897,637.84 (value of propety transferred) x .30617, remainder factor for age 30—$274,829.78, value of gift.

	Returned	Recommended	Proposed Adjustment
Total gifts, 1936	$ 0.00	$48,635.52	$274,829.78
Less exclusions	0.00	0.00	0.00
Amount included	0.00	$48,635.52	$274,829.78
Less specific exemption	0.00	40,000.00	40,000.00
Net gifts, 1936	$ 0.00	$8,635.52	$234,829.78
Tax on net gifts	0.00	$129.53	$25,174.47
Increase (additional deficiency)			$25,044.94

[fol. 78] [File endorsement omitted]

UNITED STATES BOARD OF TAX APPEALS

Docket No. 103010

[Title omitted]

ANSWER—Filed July 25, 1940

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.

2. Admits the allegations of paragraph 2 of the petition.

3. Admits the allegations of paragraph 3 of the petition.

4. a, b, and c Denies the allegations of paragraphs 4 a, b, and c of the petition.

5. a Admits that on January 14, 1936, the petitioner executed an Indenture of Trust and conveyed certain property to trustees; denies the remaining allegations of paragraph 5 a of the petition.

b to f. Denies the allegations of paragraphs 5 b to f, inclusive, of the petition.

6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified or denied.

[fol. 79] Wherefore, it is prayed that the petition be denied.

(Signed) J. P. Wenchel, A., Chief Counsel, Bureau of Internal Revenue.

Of Counsel: Hartford Allen, Division Counsel; Eugene G. Smith, Special Attorney, Bureau of Internal Revenue.

[fol. 80] [File endorsement omitted]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103010

[Title omitted]

AGREED STATEMENT OF FACTS—Filed December 5, 1940

It Is Hereby Stipulated and Agreed by and between the petitioner and the respondent, by their respective counsel, that the following facts shall be taken as true for the purposes of the above entitled proceeding, with leave to either party to introduce other and further evidence not inconsistent with the facts herein stipulated:

1. The petitioner is an individual residing in Philadelphia, Pennsylvania. On January 14, 1936, the date petitioner executed the Indentures of Trust hereinafter described, she was thirty (30) years of age, unmarried and without issue.

2. That on January 14, 1936, the petitioner, as Grantor, and The Girard Trust Company, Edward B. Robinette and George Earle Robinette, all of the City of Philadelphia, Pennsylvania, as Trustees, entered into an irrevocable Indenture of Trust (hereinafter referred to as the "Girard Trust"), a true copy of which is attached hereto and made a part hereof, marked Exhibit "A".

[fol. 81] 3. That on January 14, 1936, the petitioner, pursuant to the provisions of the Girard Trust, assigned, transferred and set over unto the Trustees the property set

forth in Schedule A annexed to and made a part of the said Indenture, of the then market value of $680,928.68.

4. That on January 14, 1936, the petitioner, as Grantor, and The Pennsylvania Company for Insurances on Lives and Granting Annuities, Edward B. Robinette and George Earle Robinette, all of the City of Philadelphia, Pennsylvania, as Trustees, entered into an irrevocable Indenture of Trust (hereinafter referred to as the "Pennsylvania Trust"), a true copy of which is attached hereto and made a part hereof, marked Exhibit "B".

5. That on January 14, 1936, the petitioner, pursuant to the provisions of the Pennsylvania Trust, assigned, transferred and set over unto the Trustees the property set forth in Schedule A annexed to and made a part of said Indenture, of the then market value of $216,709.16.

6. The provisions of the trust indentures marked Exhibits "A" and "B" are similar in all respects, except as to the amount and classification of the properties transferred thereunder.

7. Under the terms of the trust indentures, the Trustees are to pay the entire income from both of the trusts to the petitioner during her life, and on her death to pay over *the* distribute the net income monthly to Meta Biddle Robinette (her mother), and to Edward B. Robinette (her father), share and share alike, and on the death of either of the latter, to pay the net income to the survivor.

[fol. 82] 8. Under the terms of the trust indenture, the Trustees are directed, on the termination of the life estates aforementioned, to pay over and distribute the corpus or principal of the trusts to the issue of the petitioner, to be divided among such issue *per stirpes* upon the attainment by such issue, respectively, of the full age of 21 years, and, in default of issue of the Grantor, then to such persons, in such proportions, and for such estates as petitioner, or Meta Biddle Robinette, or Edward B. Robinette, whichever of said three shall be the survivor, may, by Last Will and Testament duly proved and allowed, direct, limit and appoint.

9. The petitioner, on March 15, 1937, filed gift tax returns for the calendar year 1936 in the office of the Collector of Internal Revenue for the First District of Philadelphia,

Pennsylvania. The returns filed by the petitioner disclosed the execution of the trust indentures on January 14, 1936, and disclaimed any gift a liability thereunder.

10. Upon audit of said gift tax returns the respondent determined that a gift occurred as to the life estates transferred to Meta Biddle Robinette and Edward B. Robinette. Said life estates were valued at $48,635.52, which resulted in a deficiency tax of $129.53. Petitioner paid the alleged additional tax.

11. Thereafter an- on or about March 12, 1940, the respondent, by ninety-day letter, notified the petitioner of his [fols. 83-105] determination that a gift occurred on January 14, 1936, as to the remainder interest under the trust, thereby resulting in an additional deficiency in tax of $25,044.94. The value of the remainder was fixed at $274,829.78 after applying the remainder factor .30617 for age 30 to the value of the property transferred. A true copy of said deficiency letter is attached to the petition herein and is by reference made a part hereof.

(Signed) Henry A. Mulcahy, Counsel for Petitioner.
(Signed) J. P. Wenchel,—a, Chief Counsel, Bureau of Internal Revenue.

"Exhibit A" and Schedule "A" Thereto to the Agreed Statement of Facts Omitted in Printing

[fol. 106] United States Board of Tax Appeals

Docket No. 103010

Elise Biddle Paumgarten, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Decision—July 8, 1941

Subsequent to the Board's report, promulgated June 10, 1941, the respondent filed a computation which the petitioner agrees is in accordance with the said report. It is, therefore,

Ordered and Decided that there is no deficiency in gift tax for 1936.

Enter: Entered July 8, 1941.

(S.) J. M. Sternhagen, Member. (Seal.)

[fol. 107] [File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

B. T. A. No. 103010

[Title omitted]

PETITION FOR REVIEW—Filed September 24, 1941

Guy T. Helvering, United States Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Third Circuit to review the decision entered by the United States Board of Tax Appeals on July 8, 1941, ordering and deciding that there is no gift tax due from Elise Biddle Paumgarten, respondent on review, for the calendar year 1936. This petition for review is filed pursuant to the provisions of Section 1141 and Section 1142 of the Internal Revenue Code.

Elise Biddle Paumgarten, respondent on review, filed her gift tax return for the year 1936 with the Collector of Internal Revenue for the First Pennsylvania District at Philadelphia, Pennsylvania, the office of which Collector is within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit.

VFW/mer 8/16/41.

(S.) Samuel O. Clark, Jr., Assistant Attorney General. (Signed) J. P. Wenchel, CAR, Chief Counsel, Bureau of Internal Revenue. Attorneys for Petitioner.

[fol. 108] [File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

B. T. A. No. 103010

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed September 26, 1941

To: Henry A. Mulcahy, Esq., 50 Broadway, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 24th day of September, 1941, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 2nd day of September, 1941.

(Signed) B. D. Gamble, Clerk, United States Board of Tax Appeals.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 25th day of September, 1941.

(Signed) Henry A. Mulcahy, Attorney for Respondent on Review.

VFW/mer 8/16/41.

[fols. 109-112] [File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

B. T. A. No. 103010

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed October 6, 1941

To: Elise Biddle Paumgarten, 12 E. Chestnut Avenue, Chestnut Hill, Philadelphia, Pa.

You are hereby notified that the Commissioner of Internal Revenue did, on the 24th day of September, 1941, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decician of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 2nd day of September, 1941.

(Signed) J. P. Wenchel, CAR; Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 29th day of September, 1941.

(Sgd.) Elise Biddle Paumgarten, Respondent on Review.

VFM/mer 8/16/41.

[fols. 113-114] Clerk's Certificates to foregoing transcript omitted in printing. (Seal.)

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7894

October Term, 1941

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

META BIDDLE ROBINETTE, Respondent.

No. 7895

October Term, 1941

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

ELISE BIDDLE PAUMGARTEN, Respondent.

MINUTE ENTRY OF ARGUMENT

And afterwards, to wit, the 6th day of March, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable William Clark and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 23d day of March, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 116] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7894-7895

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

vs.

META BIDDLE ROBINETTE, Respondent

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

vs.

ELISE BIDDLE PAUMGARTEN, Respondent

On Petitions for Review of Decisions of the United States Board of Tax Appeals

OPINION—Filed March 23, 1942

Before Biggs, Clark, and Jones, Circuit Judges

[fol. 117] CLARK, Circuit Judge:

In 1936 the younger respondent was contemplating marriage. To make sure that the family fortune would follow the line of descent the three trusts in the case at bar were established by her and her mother, the older respondent. By the terms of two of these instruments properties were irrevocably transferred to trustees by the daughter. Her trustees were to pay the entire income from the trusts to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either to the survivor. Upon termination of the life estates, the trustees were to distribute the corpus to the issue of the grantor per stirpes, upon their reaching the age of twenty-one, and in default of such issue, then to such persons, and in such proportions, and for such estates as the survivor of the three life tenants should by will appoint. The mother likewise transferred property irrevocably to trustees pursuant to an instrument similar to the above except for the fact that the order of the life estates was mother, husband and daughter. After gift taxes had been paid on the life

estates, the Commissioner assessed deficiencies based upon the remainder interests in these trusts. From a holding by the Board of Tax Appeals that the remainder interests did not constitute taxable gifts the Commissioner has appealed.

The separate enactment of the income, estate, and gift taxes and the piecemeal amendment of all three "to meet specific avoidance situations" has resulted in a lack of correlation.[1] This lack is of course not overlooked by taxpayers. The case at bar presents one such effort. This[2] and other recent decisions of the Board of Tax Appeals[3] [fol. 118] have, we might say, distinctly implemented that effort. The Board has taken the view that the gift tax does not apply wherever the gift might be included in the donor's estate for purposes of the estate tax. From this they conclude that no gift tax may be imposed where the settlor retains a possible power of testamentary disposition. They assert that this holding follows inevitably from certain language in the then Mr. Justice Stone's opinion in Estate of Sanford v. Commissioner:

"There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in pari materia and must be construed together."

308 U. S. 39, 44

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[1] Greenfield, Correlation of Federal Income, Estate and Gift Taxes, 16 Temple University Law Quarterly 194; Warren, Correlation of Gift and Estate Taxes, 55 Harvard Law Review 1.

[2] Meta B. Robinette, 44 B. T. A. 701.

[3] Margaret Marshall, 43 B. T. A. 99; Carl Schmidlapp, 43 B. T. A. 829; Morris Michel, 43 B. T. A. 1036. Prior to the Supreme Court decision in Sanford v. Commr. 308 U. S. 39 the Board had held contra, William Walker, 40 B. T. A. 761.

Discussing this passage a writer in the Columbia Law Review poses and answers some questions:

"These sentences are addressed primarily to a case in which the settlor had reserved powers over the disposition of the entire property in question. Will they be given general application to cases in which the transferor has retained a sufficient interest in the property to require its inclusion in his gross estate, but has not retained powers over the ultimate disposition of all of it? * * * Nevertheless, the wife has clearly acquired a valuable interest at the time the tenancy was created, and it is not at all subject to reserved powers in the husband. The value of the gift is not the full value of the property, but both in common parlance and in legal contemplation a completed gift of ascertainable value seems to have been made.

[fol. 119] "A narrower test than that posed above may be evolved from the consideration of cases of joint tenancies, and of transfers containing reservations by the transferor of various other interests. * * * Has the transferor completely relinquished, *inter vivos*, ownership and control of interests in the property having an ascertainable value? If he has, a gift tax may be applied, even though the estate tax may also be applicable. On the whole, this narrower test seems more reasonable than a determination that, except for transfers in contemplation of death, the gift tax only applies if the estate tax does not. For there are a good many instances of transfers during life which for purposes other than gift taxation are everywhere regarded as completed gifts, but which are nevertheless includable in the gross estate. It seems that the gift tax should apply to transfers of this character; and accordingly that the coordination of the gift tax and estate tax statutes in these instances should be effected by changes in the latter, not by a judicial interpretation of the former that brings it out of line with the general law. * * *

"Are *inter vivos* transfers in which the settlor has reserved to himself some reversionary interest subject to a gift tax as well? If the gift tax is merely supplementary to the estate tax, it is quite arguable that no gift tax can be imposed. These cases seem to be distinguishable, however, from the situation of the *Sanford* case, for reasons already outlined. A valuable irrevocable interest in another has been created by the settlor. There is no power in him

to get it back; so long as the beneficiaries live, they will enjoy the income of the property, free from his control. Hence it seems that, to the extent of the value of the interests created in donee-beneficiaries, there is a taxable gift."

Magill, The Federal Gift Tax, 40 Columbia Law Review 773, 783, 787

[fol. 120] We confess that we agree with these answers and further believe that the case at bar is embraced therein. The respondent settlors retained no economic control over the trusts except for the possibility that during the settlors' lifetime the life tenants die with the younger respondent remaining childless. Thus, the settlors could not themselves bring about the exercise of their powers of appointment without committing a crime. This view is supported by the recent decision of Judge Frank in Commissioner v. Marshall [4] and is the one taken by a tax expert writing in the Harvard Law Review:

"It thus appears that such a reversionary interest in the grantor would not prevent the imposition of a gift tax. Certainly the transfer to a trustee of property over which the grantor only reserves a possibility of reverter (irrespective of its proximity or remoteness) constitutes such a transfer of property as is covered by the gift tax. If the gift tax is merely supplementary to the estate tax, of course no gift tax can be levied, but these trusts are distinguishable from the trusts in the *Sanford* case because here the grantor reserved no economic control."

Warren, Correlation of Gift and Estate Taxes, 55 Harvard Law Review 1, 25.

We are not disturbed by the fact that no donees of the reversionary interest were in existence at the date of the creation of the trust. The tax is primarily payable by the donor on his transfers by gift [5] and not by the donees on their receipts.[6] Since the donors have irrevocably parted with the property, the tax should attach even though the

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[4] C. C. A. 2d, Feb. 3, 1942, reversing Margaret Marshall, note 3 supra.

[5] Int. Rev. Code §1008(a).

[6] The tax remains a lien on the gift and if not paid the donee may be liable. Int. Rev. Code §1009.

donees are not wholly ascertainable.[7] In the words of our previously quoted Mr. Warren:

[fol. 121] "The taxable event is, therefore, the irrevocable divestment of all the donor's rights in the property, rather than the irrevocable vesting of rights in particular beneficiaries."

Warren, Correlation of Gift and Estate Taxes, 55 Harvard Law Review 1, 15.

Taxpayers also argue that the transfers were made for "adequate and full consideration in money or money's worth."[8] In so doing they are talking about one thing while the statute is talking about another. Concededly mutual promises may be consideration for a contract in the common law sense.[9] The legislative history and perhaps even the words of the statute give a contrary meaning:

"The tax is designed to reach all transfers to the extent that they are donative and to exclude any consideration not reducible to money or money's worth."

H. R. Rep. No. 708, 72d Cong., 1st Sess. (1932) p. 29; Sen. Rep. No. 665, 72d Cong., 1st Sess. (1932) p. 41.

This view is further supported by a history of the cognate acts. The Revenue Act of 1924 permitted a deduction from the estate tax for claims against the estate which were "incurred or contracted bona fide and for a fair consideration in money or money's worth."[10] The 1926 Act changed the words "fair consideration" to the present statutory words, "adequate and full consideration."[11] The cases under this cognate estate tax provision limit "adequate and full consideration" to liabilities founded upon

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[7] See Treasury Regulations 79, Art. 3 (1936) as amended by T. D. 5010, 1940-2 Cum. Bull. 293. Cf. Herzog v. Commr., 116 F. (2d) 591.

[8] Int. Rev. Code §1002.

[9] 1 Williston, Contracts § 103.

[10] Revenue Act of 1924 Sec. 303(a)(1).

[11] Revenue Act of 1926 Sec. 303(a)(1). Int. Rev. Code §811.

contract.[12] A family agreement regarding testamentary [fol. 122] dispositions does not meet this statutory requirement of consideration.[13] Likewise an exchange of such promises does not constitute the necessary "adequate and full consideration in money or money's worth" as used in the gift tax. The essential quality of these transfers was the disposition of property by way of gift. The concerted action of the taxpayers in no way affects that quality.[14]

The decisions of the Board of Tax Appeals are reversed.

[fol. 123] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7894

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

META BIDDLE ROBINETTE, Respondent

JUDGMENT—March 23, 1942

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

William Clark, Circuit Judge.

March 23, 1942.

[File endorsement omitted.]

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[12] See H. R. Rep. No. 708, 72d Cong., 1st Sess. p. 48; Sen. Rep. No. 665, 72d Cong., 1st Sess., p. 51.

[13] Markwell's Estate v. Commr., 112 F. (2d) 253; Estate of F. A. Gray, 44 BTA 545. See also Latty v. Commr., 62 F. (2d) 952.

[14] Commr. v. Bristol, 121 F. (2d) 129.

[fol. 124] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7895

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

ELSIE BIDDLE PAUMGARTEN, Respondent

JUDGMENT—March 23, 1942

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

William Clark, Circuit Judge.

March 23, 1942.

[File endorsement omitted.]

[fol. 125] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

Nos. 7894-7895

[Title omitted]

PETITION FOR REHEARING—Filed April 7, 1942

The respondents herein respectfully make application for a rehearing and reconsideration of these cases.

The opinion of this Court was promulgated and the judgment was entered on March 23, 1942, reversing the decisions of the Board of Tax Appeals.

[File endorsement omitted.]

[fol. 126] The issue involved in these cases is whether the transfers of *the remainder interests* made by the respondents under the irrevocable indentures of trust dated Janu-

ary 14, 1936, constituted taxable gifts in the year 1936, within the meaning of Sections 501 *et seq.* of the Revenue Act of 1932, as amended.

In support of this petition for rehearing, respondents respectfully show:

I

It is respectfully suggested that in reversing the decisions of the Board of Tax Appeals this Court has omitted (apparently through oversight) to allow the respondents the right to deduct the value of the retained reversions for the purpose of computing the value of the alleged gifts, i.e., the remainders.

Counsel for the petitioner, in his argument and in his brief conceded that in computing the value of gifts in trust, allowance must be made for the value of the donor's reversionary interest. The Court will recall that on the argument petitioner's counsel submitted an oral computation of the value of the remainder interests upon which a gift tax was claimed, which computation included therein and made provision for an allowance or credit equal to the value of the respondents' reversionary interests.

The value of the reversionary interests retained by each of the donors herein can be readily and easily ascertained by a reference to the accepted mortality or actuarial tables. Such a computation has not been necessary prior to this Court's opinion of March 23, 1942, for the reason that the petitioner was seeking to levy a gift tax on the full value of the corpus of each trust without allowance for the reversionary interests in the settlors and the Board of Tax Appeals had agreed with the respondents that the petitioner's determination was made in error.

[fol. 127] The following excerpts from the opinion indicate that this Court recognized that the value of the reversionary interests ought to be deductible in ascertaining the value of the alleged gifts, i.e., the remainders:

Page 3:

"The value of the gift is not the full value of the property, but both in common parlance and in legal contemplation a completed gift of ascertainable value seems to have been made."

Page 4:

"Are *inter vivos* transfers in which the settlor has reserved to himself some reversionary interest subject to a gift tax as well? • • • Hence it seems that, to the extent of the value of the interests created in donee-beneficiaries, there is a taxable gift."

Page 5:

"The respondent settlors retained no economic control over the trusts *except* for the possibility that during the settlors' lifetime the life tenants die with the younger respondent remaining childless. • • •

'It thus appears that such a reversionary interest in the grantor would not prevent the imposition of a gift tax.' • • •

We are not disturbed by the fact that no donees of the reversionary (remainder?) interest were in existence at the date of the creation of the trust."

It is respectfully suggested that in view of the foregoing, this Court should not have reversed the decisions of the Board but should, at most, have modified them with instructions to the Board to take further evidence with respect to the value of such reversions.

[fol. 128] II

It is further respectfully suggested that in rendering its opinion in these cases the Court has misinterpreted the arguments and the issues involved herein, particularly those with reference to the reversions and remainders. At the bottom of page 5 of its opinion the Court has stated:

"We are not disturbed by the fact that no donees of the reversionary interest were in existence at the date of the creation of the trust. The tax is primarily payable by the donor on his transfers by gift and not by the donees on their receipts. Since the donors have irrevocably parted with the property, the tax should attach even though the donees are not wholly ascertainable."

The attention of the Court is particularly called to the words "reversionary interest" in the foregoing extract from the opinion. This was apparently intended to read "remainder interests".

A reversion has been defined to be "the residue of an estate left in the grantor or his heirs, or in the heirs of the testator, commencing in possession on the determination of one or more particular estates granted or devised".

A remainder has been defined to be "a future estate dependent upon a precedent estate".

Hence a reversion is an estate retained by the grantor. It is not a transfer, and involves no donees. A remainder is a transferred estate which may under certain circumstances vest in another, and therefore involve donees. To subject a reversion to a gift tax would be tantamount to taxing a gift to oneself.

The only issue presented to the Court on this appeal was, in the wording framed by the petitioner in his brief (p. 3), whether the respondents are subject to gift tax under Sections 501 and 506 of the Revenue Act of 1932 *upon the value of the remainders* at the time of the establishment of the trust. See also the respondents' brief (p. 2).

[fol. 129] The Court, as shown above, discusses and concedes the existence of a reversion in each of the respondent donors and concludes that such reversionary interests should not prevent the imposition of a gift tax, but at the same time omits to specify that the gift tax, should attach only to the remainders after due allowance for the reversions.

Having thus concluded, the Court then states it is not disturbed by the fact that no donees of the reversionary interests were in existence at the date of the creation of the trusts. Neither the petitioner nor the respondents has contended that there were no donees of the reversionary interests in existence on the date of the creation of the trusts and no such contention could be made since such interests were retained by the respondent settlors. In the words of the quotation on page 6 of the opinion, "The taxable event is, therefore, the irrevocable divestment of all the donor's rights in the property, * * *." A reversion being a retained estate, no divestment thereof can be asserted. The issue raised by the respondent's brief (pp. 12-17) was that no donees *of the remainder interests* as distinguished from the reversionary interests were in existence on the date of the creation of the trusts and that therefore a gift of such remainders could not have been effected.

If the Court's opinion herein is to be accepted at its face value and to be interpreted to mean that reversionary in-

terests are subject to a gift tax, then it is contrary to the gift tax law, regulations and decisions which specifically exempt such interests from the tax.

III

It is also respectfully suggested that the Court erred as a matter of law in holding that "the tax should attach even though the donees are not wholly ascertainable."

The Court supported its decision on this point by a reference to Treasury Regulations 79, Art. 3 (1936), as [fol. 130] amended by T. D. 5010, 1940-2 Cum. Bull. 293. As was pointed out in the respondents' brief, Article 3 of Regulations 79 in the form referred to is not applicable to the instant cases since that regulation only became effective on February 26, 1936, and affected transfers on and after that date, whereas the instant transfers occurred on January 14, 1936.

The illegality of the previous edition of Article 3 of Regulations 79 was fully covered on pages 16 and 17 of the respondents' brief.

In holding that the tax should attach even though the donees are not wholly ascertainable, the Court is disregarding the decisions in *Porter* v. *The Comm'r*, 288 U. S. 436, wherein it was held:

"A gift is a bi-lateral transaction and requires a donee as well as a donor. It is incomplete though the donor has parted with his interest *if the donee remains indeterminate* and the beneficiaries are determined only when the power to change them ends."

and in *McBrier* v. *Comm'r*, (3rd Cir.) 108 Fed. (2d) 967 (written by Clark, Circuit Judge, who wrote the opinion in the instant cases), wherein it was held:

"Furthermore, it has been recognized that where a settlor has irrevocably transferred property to a trust, reserving only the power to change the beneficiary to persons other than himself, there is no taxable gift since the *cestuis que trust* are not finally determined, *and a gift requires a definite donee.*"

No case decided by the United States Supreme Court, thus far, has accepted the doctrine propounded by Warren and relied upon by this Court to the effect that the irre-

vocable divestment of all of the donor's rights in the property rather than the irrevocable vesting of rights in particular beneficiaries, determines the taxable event (Opinion, p. 6; cf. also p. 5). In fact the *Sanford* case cannot be interpreted otherwise than as rejecting this theorist doctrine.

[fol. 131] It is therefore respectfully submitted that this application for a rehearing be granted and that these cases be set down for reargument.

Respectfully submitted, Henry A. Mulcahy, Attorney for Respondents.

CERTIFICATE OF COUNSEL

I, the attorney of record for the respondents herein, certify that this petition for rehearing is presented in good faith and not for delay.

Dated, New York, April 4th, 1942.

Henry A. Mulcahy, Attorney for Respondents.

[fol. 132] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7894

[Title omitted]

ORDER GRANTING PETITION FOR REHEARING—April 21, 1942

And Now, to wit, April 21, 1942, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

Philadelphia,

John Biggs, Jr., Circuit Judge.

[File endorsement omitted.]

[fol. 133] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7895

[Title omitted]

ORDER GRANTING PETITION FOR REHEARING—April 21, 1942

And Now, to wit, April 21, 1942, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

Philadelphia,

John Biggs, Jr., Circuit Judge.

[File endorsement omitted.]

[fol. 134] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7894-7895

[Title omitted]

MINUTE ENTRY OF REARGUMENT—May 5, 1942

And afterwards, to wit, the 5th day of May, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 30th day of July, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 135] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7894

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*,

v.

META BIDDLE ROBINETTE

No. 7895

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*,

v.

ELISE BIDDLE PAUMGARTEN

On Petitions for Review of Decisions of the United States Board of Tax Appeals

OPINION UPON REHEARING—Filed July 30, 1942

Before Biggs, Jones and Goodrich, *Circuit Judges*

[fol. 136] GOODRICH, *Circuit Judge*:

In our previous decision in this case we decided that the remainder interests, created by the trust agreements there involved, constituted taxable gifts. We granted a rehearing when the taxpayers pointed out that no allowance was made for the grantors' reversionary interests in calculating the value of the remainders. Other points were also pressed, but we do not discuss them again here because we believe they were correctly determined in the original opinion, to which we adhere.

The grantors were mother and daughter. Each of the trust indentures created a life estate for the grantor, succeeding life estates, and then provided for the distribution of the corpus to the daughter's issue at majority. In default of such issue, general powers of testamentary appointment were given to the last surviving life tenant. The taxpayers contend that at the least they are entitled to have the cases remanded to the Board to compute the value of

the reversionary interest remaining in the grantor of each trust. This they contend must be deducted in order to furnish the proper determination of the value of the remainders. The Commissioner, on the other hand, contends that whatever either taxpayer has left by way of reversion is too contingent and remote to be valued. It is to be borne in mind that the question here is the valuation of the remainders created in each of these two deeds of trust. According to the Regulations [1] it is made on the basis of the "present value of $1 due at the end of the year of death of a person of specified age". Such an evaluation is a matter of calculation from the facts and figures already in the record in these cases. The sum thus arrived at is not affected by the fact that the daughter-grantor may never have children who attain the age of majority and thus become eligible to receive these gifts. The terms of the indentures were direct and unqualified and the gifts thus made are not under the [fol. 137] control of either grantor in any way. Only if no child of the daughter-grantor attains the age of majority does the survivor among the life tenants have any opportunity for the exercise of the power of appointment. Failing such appointment there would be, presumably, a distribution of the corpus to the next of kin of the grantor of each trust. In any event, however, if these remainders vest in the children of the daughter-grantor their value is not lessened in any way by what might happen if there were no children to take it. If they get the gifts at all they get the whole of them. The reversionary interests cannot in any way defer the time when the gifts will vest; nor can they defeat the latter. We think, therefore, that each of the respective settlors made such a gift as makes the whole taxable, subject, of course, to the reserved life estate. The cases do not need to be sent back for an evaluation of the reversionary interests.

Differing terms found in instruments creating trusts of course make for differing results on this point. Thus, in Commissioner of Internal Revenue v. Marshall, 125 F. (2d) 943 (C. C. A. 2, 1942), there was a provision for distribution to the settlor if living upon the death of the life beneficiary and, if not, then to other beneficiaries. However, in neither the Marshall case nor Hughes v. Commissioner of Internal

[1] Treas. Reg. 79, Art. 19(7) and Table A.

Revenue, 104 F. (2d) 144 (C. C. A. 9, 1939), where similar reversionary interests were involved, is there a determination of this exact point. Cf. Herzog v. Commissioner of Internal Revenue, 116 F. (2d) 591 (C. C. A. 2, 1941). Commissioner of Internal Revenue v. McLean, — F. (2d) — (C. C. A. 5, 1942) which comes close to the facts of this case was sent back to the Board of Tax Appeals to determine the value of that which the court felt was not included in the gift. We think that in our case each settlor gave away the whole estate and only in the event that the gift failed by reason of subsequent events would either have any further concern with its disposition. We conclude, therefore, that the tax was properly based upon the method adopted by the Commissioner.

[fol. 137a] The order of the Court upon rendering the first opinion in this case was that "The decisions of the Board of Tax Appeals are reversed". We affirm that order.

[fol. 138] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 139] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

[Title omitted]

STIPULATION AS TO RECORD—October 27, 1942

The parties herein, by their counsel, respectively, do hereby stipulate and agree for the purpose of the petition for writs of certiorari filed herein:

1. That the petition may be considered upon Appendix B to the Brief of the Commissioner, as supplemented by the proceedings in the United States Circuit Court of Appeals for the Third Circuit;

2. That the original record shall be lodged with the Supreme Court of the United States;

3. That in the event the petition is granted, counsel will then stipulate to print from said original record, those parts that they deem material.

4. It is further stipulated that either party may refer in their briefs and oral argument to any part of the original record filed in the Supreme Court of the United States which has not been printed.

[fol. 140] Charles Fahy, Solicitor General of the United States, Attorney for Respondent. Henry A. Mulcahy, Guilford S. Jameson, Attorneys for Petitioners.

October 27, 1942.

[fol. 141] Supreme Court of the United States, October Term, 1942

No. 499

Order Allowing Certiorari—Filed December 7, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 429, Smith vs. Shaughnessy, Collector of Internal Revenue, etc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 142] Supreme Court of the United States, October Term, 1942

No. 500

Order Allowing Certiorari—Filed December 7, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following Nos. 429 and 499.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 143] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1942

[Title omitted]

STIPULATION AS TO PRINTING RECORD—Filed December 10, 1942

Subject to this court's approval, it is stipulated that for the consideration of these cases on writs of certiorari to the Circuit Court of Appeals for the Third Circuit, granted December 7, 1942, the printed record may consist of the following:

1. As to No. 499—

Docket Entries (R. 1-1A)
Petition to Board of Tax Appeals, including Exhibit A (R. 2-8)
Answer (R. 9-10)
Agreed Statement of Facts, including Exhibit A but excluding Schedule A thereto (R. 11-22)
Findings of Fact and Opinion of Board of Tax Appeals (R. 26-29)
Decision (R. 30)
Petition for Review with Notices of Filing (R. 31-33)
Order of Consolidation in Circuit Court of Appeals (R. 68)

2. As to No. 500—

Docket Entries (R. 70-70A)
Petition to the Board of Tax Appeals, including Exhibit A (R. 71-77)
Answer (R. 78-79)
Agreed Statement of Facts, omitting Exhibits A and B (R. 80-84)
Decision (R. 106)
Petition for Review and Notices of Filing (R. 107-109)

[fol. 144] 3. The Proceedings in the Circuit Court of Appeals for the Third Circuit as certified by the Clerk of that Court.

4. It is further stipulated that in the briefs and Arguments in the Court, either party may refer to any portion

of the transcript of record which is not included in the portions of the record to be printed as above described.

Henry A. Mulcahy, Guilford S. Jameson, Attorneys for Petitioners. Charles Fahy, Solicitor General of the United States, Attorney for Respondent.

Endorsed on cover: File No. 47,000, 47,001. U. S. Circuit Court of Appeals, Third Circuit. Term No. 499. Meta Biddle Robinette, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Term No. 500. Elise Biddle Paumgarten, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for writs of certiorari and exhibit thereto. Filed October 29, 1942. Term Nos. 499, O. T. 1942; 500, O. T. 1942.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 499

META BIDDLE ROBINETTE,

Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

No. 500

ELISE BIDDLE PAUMGARTEN,

Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

HENRY A. MULCAHY,
GUILFORD S. JAMESON,
Attorneys for Petitioners.

INDEX

TABLE OF CITATIONS

Cases

Statutes

Treasury Regulations

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No.

META BIDDLE ROBINETTE,

Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

No.

ELISE BIDDLE PAUMGARTEN,

Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Meta Biddle Robinette and Elise Biddle Paumgarten, by their attorneys, respectfully pray that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Third Circuit, entered in the above-entitled causes on July 30, 1942, reversing the decisions of the United States Board of Tax Appeals made on July 8, 1941.

Nature of the Proceeding

The appeals instituted in the Board of Tax Appeals were to review deficiencies in Federal gift taxes for the year 1936 assessed by the Commissioner against the petitioners, Meta Biddle Robinette and Elise Biddle Paumgarten, in the amounts of $3,155.57 and $25,044.94, respectively.

By stipulation between the parties the cases were consolidated for briefing, hearing, argument and decision upon a single consolidated transcript of record in the Circuit Court of Appeals.

Opinions Below

The opinion of the Board of Tax Appeals in both cases is reported in 44 B. T. A. 701. The opinions of the Circuit Court of Appeals both upon the original appeal to that Court and upon the reargument therein are reported in 129 F. (2d) 832. (R. ffs. 3 to 9, 20 to 27, 39 to 42)

Jurisdiction

The judgments below were entered on July 30, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. (R. f. 38)

Questions Presented

(a) Whether the remainder interest under an irrevocable inter-vivos transfer in trust is taxable under Sections 501 et seq. of the Revenue Act of 1932, as amended, where the grantor provides that the income is to be paid to the grantor for life, then to two others for life, the remainder interest then to go to children, if any, when

they reach twenty-one, or, if none, then to the testamentary appointees of the survivor of the grantor and the two others with life interests.

(b) Whether the Commissioner in valuing a trust remainder for gift tax purposes must make due allowance for and deduct the value of a reversionary interest retained by the grantor.

Statement of the Matter Involved

The facts as found by the Board of Tax Appeals may be summarized as follows: (R. 4-7, 9-11)

Elise Biddle Paumgarten was, before her marriage, Elise Biddle Robinson. She is the daughter of Meta Biddle Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan the trust indentures were executed on January 14, 1936, by the mother and daughter in the presence of all three. The stepfather's will had been executed shortly before.

Petitioner, Meta Biddle Robinette, who was then fifty-five years old, executed an irrevocable trust indenture, the Pennsylvania Co. for Insurances on Lives & Granting

Annuities, Edward B. Robinette and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $193,546. The trustees were to pay the entire income to the grantor during her life, and on her death to her husband monthly, and on his death to her daughter monthly for life. Upon the termination of the life estates the trustees were to distribute the corpus to the issue of the daughter *per stirpes* upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons in such proportions and for such estates as the survivor of the three should by will appoint.

At the same time, this petitioner executed a revocable trust indenture the provisions of which were the same as those of the irrevocable trust, and she transferred to the trustees certain securities.

Petitioner, Elise Biddle Robinson, who was then thirty years old, executed an irrevocable trust indenture, the Girard Trust Company, Edward B. Robinette and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $680,928.68. The trustees were to pay the entire income from the trust to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either to the survivor. Upon termination of the life estates the trustees were to distribute the corpus to the issue of the grantor *per stirpes* upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons, and in such proportions and for such estates as the survivor of the three should by will appoint. Elise Biddle Robinson was married in April of 1936 and now has issue.

At the same time, this petitioner executed an irrevocable trust indenture, the Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette and George Earle Robinette being the trustees. The terms were identical with the Girard trust aforementioned ex-

cept as to the amount and classification of the properties. To the trustees she transferred property having a market value of $216,709.16. At the same time, she executed a revocable trust indenture to the same trustees, with the same provisions as the irrevocable trust, and transferred certain securities to the trustees.

The petitioners' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures of January 14, 1936, and claimed there was no gift tax liability.

The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at $57,958.40 and assessed a tax of $388.75 against her, which she paid about January 29, 1940. The Commissioner determined that the life estates transferred to the mother and stepfather were gifts by Elise Biddle Robinson, valued them at $48,635.52 and assessed a tax of $129.53 against her, which she paid about January 29, 1940.

Thereafter the Commissioner issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 4, 1936, were gifts, and determining an additional deficiency of $3,155.57 against Meta Biddle Robinette and $25,044.94 against Elise Biddle Robinson.

The value of the remainder in the Meta Biddle Robinette trust was fixed by the Commissioner at $104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by Commissioner at $274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred.

Upon review by the Board of Tax Appeals the determination of the Commissioner was reversed. (R. 9)

The Commissioner appealed to the Circuit Court of Appeals for the Third Circuit, and on March 23, 1942, that

Court entered its decision that the transfers of the remainder interests under the trusts constitute taxable gifts. On April 21, 1942, the Circuit Court granted a petition for rehearing filed by the grantors, and thereafter on July 30, 1942, entered its decision reaffirming its opinion of March 23, 1942, and further holding that each of the grantors made such a gift as rendered the whole remainder taxable, and that the cases were not required to be remanded to the Board of Tax Appeals for evaluation of the grantors' reversionary interests. The final decision of the Circuit Court of Appeals was therefore entered on July 30, 1942, and it is the decision of the Circuit Court of Appeals reversing the Board which the petitioners seek to review in this Court.

Reasons for Allowing the Writs

1. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

The decision below, we respectfully submit, is sharply in conflict with the decisions of this Court in *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U. S. 39, and *Burnet* v. *Guggenheim*, 288 U. S. 280.

This Court in *Sanford's Estate* v. *Commissioner*, supra, at page 42, held that the gift tax is supplemental to the estate tax, and the two must be construed together; that a transfer could not be subject to the gift tax unless before the grantor had fully parted with his interest in the property given; and that the test of the completeness of the tax gift was to be no different from that to be applied in determining whether the grantor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death.

According to *Burnet* v. *Guggenheim*, supra, at page 285, this Court held that the gift tax statute does not contemplate two taxes upon gifts not made in contemplation of

death, one upon the gift when a trust is created, or when the grantor's retained interest, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete, by reason of the grantor's retained interest.

The Circuit Court of Appeals below in subjecting the remainder interests herein to a gift tax despite the grantors' retained interests therein has therefore apparently rejected the principles laid down by the Supreme Court in the *Sanford's Estate* v. *Commissioner* and *Burnet* v. *Guggenheim cases*, supra.

2. The Circuit Court of Appeals below has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

The decision below, we respectfully submit, is sharply in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean*, 127 F. (2d) 942. The Court of Appeals for the Fifth Circuit in the *McLean* case held that where certain trust instruments were executed simultaneously by the taxpayer and his wife authorizing trustee to pay annually any income of the trust to settlor's surviving spouse for life, with provision that the corpus and accumulated income should be distributed to taxpayer's daughter upon life beneficiary's death, and that if the daughter, predeceased by the beneficiary, left no surviving children or grandchildren, the trust estate should revert to the settlor, if living, unless the daughter left a will disposing of it, the possibility of reverter was not too remote to be valued for gift tax purposes and remanded the case to the Board of Tax Appeals with instructions to value the estates transferred in trust and deduct the value of the reversionary interest retained by the settlor.

The Circuit Court of Appeals below in deciding that the grantors herein made such a gift as makes the entire remainder taxable without deduction of the retained reversionary interests has therefore decided the instant cases contrary to the decision of the Circuit Court of Appeals for the Fifth Circuit in the *McLean* case, supra.

Prayer

For the foregoing reasons your petitioners pray that writs of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Fifth Circuit commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this case, to the end that these causes may be reviewed and determined by this Court; that the judgments of the Circuit Court of Appeals be reversed; and that the petitioners be granted such other and further relief as may be proper.

META BIDDLE ROBINETTE,
ELISE BIDDLE PAUMGARTEN,
Petitioners,

By

HENRY A. MULCAHY,
GUILFORD S. JAMESON,
Their Attorneys.

Dated: October 24, 1942.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Board of Tax Appeals is reported in 44 B. T. A. 701. (R. fols. 7 & 9)

The opinions of the Circuit Court of Appeals both upon the original appeal to that Court and upon the reargument therein are reported in 129 F. (2d) 832. (R. fols. 20 & 26, 39 & 42)

Jurisdiction

The judgments below were entered on July 30, 1942.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of the Case

A summary statement of the facts is given in the petition, pages 3 to 6 above.

Statutes Involved

The statutes and regulations involved will be found in the Appendix, *infra*, pages 16 to 17.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that the transfers in trust here in issue by the terms of which the grantor provided that the income is to be paid to the grantor for life, then to two others for life, the remainder interest then to go to children, if any, when they reach 21, or, if none, then to the testamentary

appointees of the survivor of the grantor and the two others with life interests, are such transfers as are subject to the gift tax provisions of the Revenue Act of 1932 as amended; and in failing to hold that the transfers in trust here in issue are not subject to tax under the gift tax provisions of the Revenue Act of 1932 as amended.

2. In deciding that no allowance or deduction, for the value of a reversionary interest retained by the grantor, need be made in valuing a trust remainder for gift tax purposes; and in reversing the judgments of the Board of Tax Appeals.

ARGUMENT

1. The decision below is in conflict with the decisions of this Court in *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, and in *Burnet* v. *Guggenheim*, 288 U. S. 280.

Heretofore it has been the generally accepted view that the gift tax is supplementary to the estate tax and that consequently a transfer is not to be taxed as a gift, if the grantor retains an interest in trust property, whether vested or contingent, sufficient to require the inclusion of the same in the grantor's gross estate subject to estate tax. In holding that the remainders herein are subject to gift tax the Circuit Court below has apparently rejected the heretofore accepted principle that the gift tax statute does not contemplate two taxes; and that a gift tax should not be imposed where it is evident that the transferred property will be subjected to an estate tax.

This view was forcefully expressed by this Court in *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 42, wherein the Court stated the following:

> "There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any

different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death.

—The gift tax was supplementary to the estate tax. The two are in pari materia and must be construed together. Burnet v. Guggenheim, supra (288 U. S. 286, 77 L. ed. 751, 53 S. Ct. 369). An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter vivos which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death."

And in *Burnet* v. *Guggenheim*, 288 U. S. 280, 285, this Court stated:

"Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice, between the one date and the other."

In the light of the above cases we consider it appropriate to accentuate the fact that the reservation by a grantor of a life estate or a testamentary power of appointment (such as retained by the grantors in the instant cases) has been declared the occasion for the imposition of an estate tax upon the corpus of the trust (cf. 26 U. S. C. A., Sec. 811; *Helvering* v. *Bullard*, 303 U. S. 297; *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. (2d) 224, cert. den. 310 U. S. 654; *Helvering* v. *Hallock*, 309 U. S. 106).

Despite the foregoing decisions of this Court, the Circuit Court of Appeals for the Third Circuit in the instant cases and the Circuit Courts of Appeals in the First, Second and Fifth Circuits in *Higgins* v. *Commissioner*, 129 F. (2d) 240; *Commissioner* v. *Marshall*, 125 F. (2d) 943, and *Commissioner* v. *McLean*, 127 F. (2d) 942, respectively, have rejected the decisions of this Court in the *Sanford* and *Gug-*

genheim cases, *supra*, thereby creating confusion and conflict in the gift and estate tax field. The resulting confusion caused Mr. Justice Hutcheson, writing for the Fifth Circuit, in the *McLean* case, *supra*, to comment as follows:

> "We think it clear that the provisions of the trust instruments as correctly summarized by the Board in its opinion, effected as to the donor, a taxable gift to the extent and value of the estates and interests in the property then transferred, and that the reservation by grantor of the possibility of reverter had no effect upon the completeness but only upon the value of the gift. We will therefore, without piling Pelion on Ossa, or vieing with Frank[4] in ancient or Clark[5] in modern, learning, or with either in erudition, general or particular, content ourselves with saying so. For, since Sanford and Hallock, supra, came down to confuse and confound followers and expounders of gift tax law, the voices of both board members and circuit judges are merely voices crying in the wilderness, and perhaps until the Supreme Court has spoken authoritatively on the question they would do best to decide the questions posed with as little bewordling and as few reasons as possible."

It is therefore respectfully submitted that the importance of the questions raised by the instant cases renders review in this Court necessary and desirable in order to dispose of the confusion which has arisen in the application of the gift and estate tax laws.

2. The decision below is in conflict with the decision of the Fifth Circuit Court of Appeals in the *Commissioner* v. *McLean* case, on the same matter.

The decision below, we respectfully submit, is sharply in conflict with the decision of the Circuit Court of Appeals in the Fifth Circuit in *Commissioner* v. *McLean*, 127 F. (2d) 942.

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[4] *Commissioner* v. *Marshall*, *supra*.

[5] *Commissioner* v. *Robinette* (instant cases).

The Circuit Court of Appeals below held in its decision, pages 835 and 836:

> "The taxpayers contend that at the least they are entitled to have the cases remanded to the Board to compute the value of the reversionary interest remaining in the grantor of each trust. This they contend must be deducted in order to furnish the proper determination of the value of the remainders. The Commissioner, on the other hand, contends that whatever either taxpayer has left by way of reversion is too contingent and remote to be valued. It is to be borne in mind that the question here is the valuation of the remainders created in each of these two deeds of trust. * * * The reversionary interests cannot in any way defer the time when the gifts will vest; nor can they defeat the latter. We think, therefore, that each of the respective settlors made such a gift as makes the whole taxable, subject, of course, to the reserved life estate. The cases do not need to be sent back for an evaluation of the reversionary interests."

The *McLean* case, *supra*, decided by the Fifth Circuit, involved the execution of reciprocal trusts, by a husband and wife, creating a life estate in a person other than the grantor and directing that the principal be distributed upon the death of the life tenant to the grantor's daughter; and, in the event the said daughter predecease the life tenant without issue, that the principal be paid to the life tenant. If, however, the daughter predecease the life tenant leaving issue, then to such issue upon the death of the life tenant. It was further provided that if none of such issue survived the life tenant or if said daughter, predeceased by the life tenant, left no issue, then the trust was to revert to the grantor if he or she be living unless the said daughter should leave a will disposing of the trust estate, in which event the trust was to go as her Will directed.

Hutcheson, J., writing for the Court, answered the same contention as made by the Commissioner in the instant cases, as follows:

> "Upon the question of its value the Commissioner contends that the entire value of the property dealt with in the transfers is includable as taxable gifts for 1934, either because the possibility of reverter was too remote to justify placing any value on it or, as was the case in Hughes v. Commissioner, 9 Cir., 104 F. 2d 144, because its value was not shown.
>
> With the first contention that the possibility of reverter was too remote to be valued we cannot agree, and there is even less merit in the second contention, that because it was not valued in the proofs, the Commissioner's valuation of the whole property must prevail in the face of our finding that the gift was not of the whole of it.
>
> The Board stating 'perhaps the transfers effected completed gifts of some estates less than a fee,' correctly stated 'the (Commissioner's) determination was not made on that basis, the values necessary to any such determination are not in the record and no such issue is suggested by the parties.' The Commissioner, having valued the property on a different theory, may not ask that the value he gave to it without regard to the reservation, be taken as its value, giving due regard thereto.
>
> The judgment of the Board while affirmed as to the 1933 taxes will be reversed as to those for 1934 and the cause as to those taxes will be remanded to it with instructions to value the estates transferred by the 1934 gift in trust, and redetermine the deficiencies accordingly" (p. 944).

Thus, in the instant cases, the Third Circuit Court of Appeals held the entire corpus of the trusts, after deduction of the primary life estates, subject to gift tax without excluding the value of the grantors' reversionary interests, whereas, in the *McLean* case, *supra*, the Fifth Circuit excluded the value of the reversion and applied the gift tax only upon the value of the remainders as such.

We respectfully submit that the two decisions are in sharp conflict on the same matter and the intervention of this Court is necessary to dispose of the confusion which has arisen by reason of the conflict, and so that uniformity of ruling may be secured.

CONCLUSION

The decision below probably being in conflict with the applicable decisions of this Court, and also in conflict with the decision of another Circuit Court on the same matter, such decision should be reviewed by this Court and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

HENRY A. MULCAHY,
GUILFORD S. JAMESON,
Attorneys for Petitioners.

APPENDIX

Revenue Act of 1932, C. 209, 47 Stat. 169

Section 501:

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

"(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *" (U. S. C., Title 26, Sec. 550).

Internal Revenue Code, 26 U. S. Code, Sec. 811

Section 811. *Gross estate:*

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * * *

"(c) *Transfers in contemplation of, or taking effect at death.* To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death with-

out such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * *

"(f) *Property passing under general power of appointment.* To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and"

* * * * * * *

Regulation 79, Art. 3:

"*Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

"As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. * * *"

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 499

META BIDDLE ROBINETTE,
Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

No. 500

ELISE BIDDLE PAUMGARTEN,
Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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GUILFORD S. JAMESON,
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INDEX

CITATIONS

Cases:

Statutes and Regulations:

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

These cases were consolidated for hearing and opinion in the Board of Tax Appeals and the court below. The opinion of the Board of Tax Appeals (R. 15-19) is reported in 44 B. T. A. 701. The opinions of the Circuit Court of Appeals on the hearing (R. 37-42) and on the rehearing (R. 50-52) are reported in 129 F. (2d) 832.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on March 23, 1942 (R. 42-43). Petition for rehearing filed April 7, 1942 (R. 43) was granted April 21, 1942 (R. 48-49). On July 30, 1942, the Court affirmed its previous order reversing the decisions of the Board (R. 50-52). The petition for writs of certiorari was filed October 29, 1942 and was granted December 7, 1942 (R. 53). The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

(a) Whether the remainder interest under an irrevocable *inter vivos* transfer in trust is taxable under Sections 501 *et seq.* of the Revenue Act of 1932, as amended, where the grantor provides that the income is to be paid to the grantor for life, then to two others for life, the remainder interest then to go to children, if any, when they reach twenty-one, or, if none, then to the testamentary appointees of the survivor of the grantor and the two others with life interests.

(b) Whether the Commissioner in valuing a trust remainder for gift tax purposes must make due allowance for, and deduct the value of, a reversionary interest retained by the grantor.

Statutes and Regulations Involved

The pertinent statutes and regulations will be found in the Appendix, *infra*, pp. 31-34.

Statement

The facts as stipulated by the parties (R. 7-14; 30-32) and found by the Board of Tax Appeals (R. 15-17) may be summarized as follows:

Elise Biddle Paumgarten was, before her marriage, Elise Biddle Robinson. She is the daughter of Meta

Biddle, Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan the trust indentures were executed on January 14, 1936, by the mother and daughter in the presence of all three. The stepfather's will had been executed shortly before (R. 15-16).

Petitioner, Meta Biddle Robinette, who was then fifty-five years old, executed an irrevocable trust indenture, The Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $193,546. The trustees were to pay the entire income to the grantor during her life, and on her death to her husband monthly, and on his death to her daughter monthly for life. Upon the termination of the life estates the trustees were to distribute the corpus to the issue of the daughter *per stirpes* upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons in such proportions and for such estates as the survivor of the three should by will appoint (R. 16).

At the same time, this petitioner executed a revocable trust indenture the provisions of which were the same as those of the irrevocable trust, and she transferred to the trustees certain securities (R. 16).

Petitioner, Elise Biddle Robinson, who was then thirty years of age and unmarried, executed an irrevocable trust indenture, the Girard Trust Company, Edward B. Robinette and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $680,928.68. The trustees were to pay the entire income from the trust to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either to the survivor. Upon termination of the life estates the trustees were to distribute the corpus to her issue *per stirpes* upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons, and in such proportions and for such estates as the survivor of the three should by will appoint. She married in April of 1936 and now has issue (R. 16).

At the same time, this petitioner executed an irrevocable trust indenture, The Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette and George Earle Robinette being the trustees. The terms were identical with the Girard trust aforementioned except as to the amount and classification of the properties. To the trustees she transferred property having a market value of $216,709.16. At the same time, she executed a revocable trust indenture to the same trustees, with the same provisions as the irrevocable trust, and transferred certain securities to the trustees (R. 17).

The petitioners' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures of January 14, 1936, and claimed there was no gift tax liability (R. 17).

The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at $57,958.40 and assessed a tax of $3[illegible]8.75 against her, which she paid about January 29, 1940. The Commissioner determined that the life estates transferred to the mother and stepfather were gifts by Elise Biddle Robinson, valued them at $48,635.52

and assessed a tax of $129.53 against her, which she paid about January 29, 1940 (R. 17).

Thereafter the Commissioner issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 14, 1936, were gifts, and determining an additional deficiency of $3,155.57 against Meta Biddle Robinette and $25,044.94 against Elise Biddle Robinson (R. 17).

The value of the remainder in the Meta Biddle Robinette trust was fixed by the Commissioner at $104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by the Commissioner at $274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred (R. 17).

The Board of Tax Appeals reversed the determination of the Commissioner, holding that the transfers were not subject to the gift tax imposed by the Revenue Act of 1932, as amended (R. 17-19).

The Commissioner appealed to the Circuit Court of Appeals for the Third Circuit, and on March 23, 1942, that Court entered its decision that the transfers of the remainder interests under the trusts constituted taxable gifts (R. 37-42). On April 21, 1942 (R. 48), the Circuit Court granted a petition for rehearing filed by the grantors, and thereafter on July 30, 1942, entered its decision (R. 50-52) reaffirming its opinion of March 23, 1942, and further holding that each of the grantors made such a gift as rendered the whole remainder taxable, and that the cases were not required to be remanded to the Board of Tax Appeals for evaluation of the grantors' reversionary interests.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding and deciding that the transfers in trust here in issue by the terms of which the respective grantors

provided that the income therefrom is to be paid to the grantor for life, then to two others for life, the remainder interest then to go to children, if any, when they reach 21 or, if none, then to the testamentary appointees of the survivor of the grantor and the two others with life interests, are such transfers as are subject to the gift tax provisions of the Revenue Act of 1932 as amended; and in failing to hold and decide that the transfers in trust here in issue are not subject to tax under the gift tax provisions of the Revenue Act of 1932 as amended.

2. In holding and deciding that no allowance or deduction, for the value of a reversionary interest retained by the grantor, need be made in valuing a trust remainder for gift tax purposes.

3. In reversing the judgments of the Board of Tax Appeals.

Summary of Argument

1. The transfers of the remainder interests made by the petitioners under the irrevocable indentures of trust on January 14, 1936, did not constitute taxable gifts within the meaning of the Revenue Act of 1932, as amended, because:

A. The transfers were made and executed by the petitioners for a good and valuable consideration in money or money's worth.

B. There were no donees in existence on the date of the creation of the trusts to accept the purported gifts of the remainders thereof.

C. The reservation by the petitioners of a possible power of appointment negatives the relinquishment *in praesenti* of dominion and control of the remainders necessary to establish the purported gift *inter vivos*.

2. In any event in computing the value of the remainders herein, allowance should be made for the value of the Grantors' reversionary interests.

ARGUMENT

1. The transfers of the remainder interests, made by the petitioners under the irrevocable indentures of trust on January 14, 1936, did not constitute taxable gifts within the meaning of the Revenue Act of 1932, as amended.

A. The transfers were made and executed by the petitioners for an adequate and full consideration in money or money's worth.

This argument was presented before the Board but the Board disposed of it as follows (R. 19):

> "The petitioners argue also * * * that they may not be taxed as upon gifts because the creation of the trusts was a reciprocal arrangement each in consideration of the other. These questions do not require decision."

Upon the renewal of the above argument on the appeal the Court below, held (R. 41) that the family agreement regarding testamentary dispositions does not meet the statutory requirement of consideration and that an exchange of such promises does not constitute the necessary "adequate and full consideration in money or money's worth" as used in the gift tax.

We respectfully submit that the decision of the Court below on this point is in error.

The Revenue Act of 1932 as amended does not provide us with a definition of the term "gift". However, an examination of the Senate Committee Report (accompanying the Revenue Act of 1932) discloses that the term "gift" was intended to be used in its broadest and most comprehensive sense. Webster's New International Dictionary, 2nd Edition, defines a gift as "anything voluntarily transferred by one person to another without compensation; a present." The term is defined in 28 *Corpus Juris* 620 as

"A voluntary transfer of property by one to another, without any consideration or compensation therefor."

Throughout the gift tax provisions of the Revenue Act of 1932 and the regulations promulgated thereunder reference is several times made to "an adequate and full consideration in money or money's worth" as being necessary to exempt a transfer from the levy of the gift tax. But what constitutes an adequate and full consideration in money or money's worth?

In reaching an answer to the problem all evidential factors, especially the effects of the family relationship, must be carefully examined.

Robinson v. *Commissioner* (1932), 59 Fed. (2d) 1008.

The Board of Tax Appeals found that the transfers made by the Respondents under the irrevocable indentures of trust dated January 14, 1936, were made and executed as an integral part of a family plan to conserve the family fortunes for those entitled to receive them by relationship and descent (R. 15-16). The plan was thought by members of the family, who were extremely close and affectionate with one another, to be necessary because Miss Robinson was then contemplating marriage and it was feared that, after her marriage, a large part of the fortune then under her control might pass under the control of her husband and be forever lost to the family. Upon consulting counsel a plan was arranged to accomplish the object in view, which plan required the parties involved to execute the following steps (Orig. Trans. 34):

> (1) Mr. Robinette, at that time being indebted to Miss Robinson for certain advances, agreed to execute a will directing that, after his death, the principal of his estate was to be paid over to Miss Robinson or her issue, subject to a life income therefrom to his wife, if she survived him. Miss Robinson, therefore, would not receive payment of the amount due her until after the death of Mr. Robinette or his wife, whichever should survive;

(2) Mrs. Robinette was to execute an irrevocable trust to which would be transferred the greater part of the moneys under her control, in which she would reserve a life income and then provide that, on her death, the income was to be paid monthly to her husband and on his death the net income to be paid to Miss Robinson as long as she lived, and on the death of the survivor of Miss Robinson and Mr. Robinette the principal was to be paid to the issue of Miss Robinson, if any, and in default of issue of Miss Robinson, then to such persons, and in such proportions and for such estates as Mrs. Robinette, Mr. Robinette or Miss Robinson, whichever of the three should be the survivor, might by last will and testament direct, limit and appoint;

(3) Mrs. Robinette was also to execute a revocable trust to which would be transferred the remaining part of the moneys under her control and containing provisions similar to the irrevocable indenture, except that said trust was to be revocable at will;

(4) Miss Robinson was to execute an irrevocable trust, to which would be transferred the greater part of the moneys under her control, reserving the life estate for herself, and then provide that on her death the income was to be paid to her stepfather and her mother, or the survivor, with the remainder over to her own issue, if any, and, in default of issue, then to such persons and in such proportions and for such estates as Mrs. Robinette or Mr. Robinette or Miss Robinson, whichever of said three shall be the survivor, may by last will and testament direct, limit and appoint;

(5) Miss Robinson was also to execute a revocable trust to which would be transferred the balance of the moneys under her control, and containing provisions similar to the irrevocable indenture, except that said trust was to be revocable at will.

Each of the foregoing steps was duly executed by Mr. Robinette and the Petitioners, and, with the exception of Mr. Robinette's will, were all executed by the parties at the same time and same place. Mr. Robinette's will was executed approximately one week prior to January 14, 1936, the date on which the Petitioners executed both the irrevocable and the revocable trusts (R. 16).

Under such family plan as outlined above, each of the three persons involved received a material and definite advantage and benefit. Mr. Robinette, by postponing the payment of the debt he owed to his stepdaughter, Miss Robinson, until after the death of himself or his wife, whichever survived, was able to provide for his wife by making her the life tenant of his estate.

Mrs. Robinette not only became assured of the receipt of income from her husband's estate during her life, but also that she would receive the income under the trusts created by her daughter should her daughter predecease her. Moreover, she was assured that, should her daughter die leaving issue, such issue would inherit virtually all their mother's estate without claim on the part of any husband her daughter might then have.

Miss Robinson became assured that ultimately her issue, should she die leaving any, would inherit the estates of her stepfather and of her mother, in addition to her own, and that she herself, if she should survive her mother and stepfather, would during her lifetime receive all the income from their respective estates.

In short, the family plan so adopted and carried out fully effected its intended purpose, namely, to keep the family fortunes in the family and thereby provide benefits to each of the three persons constituting the family to a greater or lesser extent, depending on the length of their lives and the order of their survivorship, and to do so principally through the creation of irrevocable trusts which could not be cancelled or modified in any manner. By this general agreement each one of these persons gave up, without regard to the future, the right to dispose of the greater part of their respective estates, within their own discre-

tion and as they might see fit. *Therefore the consideration between the Petitioners for the execution of the irrevocable trusts here involved was an agreement that each would transfer in trust subject to similar provisions the greater part of the moneys under her control.*

The valuation of the assets transferred by each of the Petitioners under the respective trusts has been stipulated by the parties and found by the Board (R. 7; 31; 16-17).

It is not to be argued that individuals give up a cherished right—that of free alienation of their property—unless an offsetting consideration passes to them. Such was the case here. The execution of the irrevocable trusts under consideration was not done in any donative spirit of free giving, but was done as the result of an actual bargain made for an adequate and valuable consideration in money or money's worth.

It must at least be conceded that, to establish a gift *inter vivos* there must be a clear and unmistakable intention on the part of the donor to give. *Edson* v. *Lucas*, 40 F. (2d) 398, 404 (1930).

The family plan adopted and carried out in this case by which each member of this family gave up, without regard to the future, the right to dispose of the greater part of their respective estates, within their own discretion as they might see fit, certainly constituted a transfer of property in the ordinary course of business, and a transaction which was bona fide at arm's length and free from any donative intent.

If this be so the Respondent is precluded from questioning the adequacy of the consideration for the transfers here involved since he has, in defining "an adequate and full consideration", promulgated Article 8 of Regulations 79 (*infra*, p. 33), which reads in part as follows:

> "* * * However, a sale, exchange or other transfer of property made in the ordinary course of business (a transaction which is bona fide at arm's length and free from any donative intent) will be considered as made for an adequate and full consideration in money or money's worth."

We therefore respectfully submit that the benefit gained by Mrs. Robinette under the trusts executed by Miss Robinson, and by Miss Robinson under the trusts executed by Mrs. Robinette, and by Mr. Robinette under the novation worked out with Miss Robinson for the delay in payment of his account constituted an adequate and valuable consideration in money or money's worth within the terms of Section 503 of the Revenue Act of 1932 as amended (*infra*, p. 31) and Article 8 of Regulations 79 promulgated under that Act for the execution of the respective trust agreements, and as such exempts said transfers from the levy of a gift tax.

B. **There were no donees in existence on the date of the creation of the trusts to accept the purported gifts of the remainders thereof.**

Each of the irrevocable trust indentures created by the petitioners directed the Trustees on the termination of the life estates to pay over and distribute the corpus or principal of the respective trusts to the issue of Miss Robinson, to be divided among such issue *per stirpes* upon the attainment by such issue respectively of the full age of twenty-one years. The facts as stipulated and as found by the Board (R. 30, 16) show that on January 14, 1936, the date of the creation and execution of the trusts by the petitioners, Miss Robinson was not married and was without issue. The trust instruments further provided that in default of issue of Miss Robinson the principal was to pass under the power of appointment to be exercised in the will of the survivor of the grantor and the two others with life interests.

The critical date for determination of whether or not a gift was effected is the date of the purported gift and the facts in existence at that time control the issue, not subsequent events. Therefore, the fact that Miss Robinson was or was not subsequently married and subsequently had or did not have issue is immaterial to the solution of the problem.

Ithaca Trust Co. v. *U. S.* (1929), 279 U. S. 151.

The gift tax statute does not attempt to tax as a gift every transfer in trust. The test of taxability is whether the transfer has the quality of a gift rather than whether it effects a valid trust. This Court stated in *Burnet* v. *Guggenheim* (1933), 288 U. S. 280, at 286,

> "The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift * * *."

The elements of a completed gift *inter vivos* have been determined in numerous decisions. *Edson* v. *Lucas* (1930), 40 F. (2d) 398, 404, is a leading Circuit Court case which reviews the authorities. The decisions are not in complete harmony as to all the necessary requirements of a completed gift, but agree that among the essential elements are the following:

> (1) There must be a donee capable of taking the gift;
>
> (2) There must be an irrevocable relinquishment to the donee of dominion and control of the subject matter of the gift; and
>
> (3) The transfer to the donee must be absolute and *in praesenti*.

In *Edson* v. *Lucas*, *supra*, the court said with respect to the concept of a completed gift (p. 404):

> "A statement frequently found in the decisions is: 'To constitute a valid gift *inter vivos*, there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately and fully executed by a delivery of the property by the donor, and an acceptance thereof by the donee.'"

This court held that a donee is essential to effect a completed gift in *Porter* v. *Commissioner* (1933), 288 U. S. 436, wherein it was said:

> "A gift is a bilateral transaction and requires a donee as well as a donor; it is incomplete though the donor has parted with his interest if the donee remains indeterminate and the beneficiaries are determined only when the power to change them ends."

The decisions of the Pennsylvania courts, under whose jurisdiction the trusts involved herein are executed, are consonant with the above-cited authorities.

Sullivan v. *Hess*, 241 Pa. 407, 88 Atl. 544;
Packer v. *Clemson*, 112 Atl. 107;
In re Kaufman's Estate, 127 Atl. 133;
In re Scanlon's Estate, 169 Atl. 106.

Furthermore, the receipt of the trust assets by the trustees did not constitute the trustees donees within the meaning of the Gift Tax Law. This Court so held in *Helvering* v. *Hutchings* (1941), 312 U. S. 393.

Likewise it cannot be successfully argued that Miss Robinson could accept the gift for her children to be born. As was stated in 28 *Corpus Juris* 627, paragraph 18:

> "There must be some person in being to accept a gift. An unmarried man cannot accept a gift for his future wife and children to be born."

Despite the well-defined concept of the essential elements of a gift established by the foregoing decisions, the Circuit Court below stated in its opinion herein of March 23, 1942, as follows:

> "We are not disturbed by the fact that no donees of the reversionary interest were in existence at the date of the creation of the trust. The tax is primarily payable by the donor on his transfers by gift and not by the donees on their receipts. Since the donors have irrevocably parted with the property, the tax should attach even though the donees are not wholly ascertainable. In the words of our previously quoted Mr. Warren: 'The taxable event is, therefore, the irrevocable divestment of all the donor's rights in the prop-

erty, rather than the irrevocable vesting of rights in particular beneficiaries.' Warren, Correlation of Gift and Estate Taxes, 55 Harvard Law Review 1, 15."

The holding by the court below implies that the transfer from the donor and the transfer to the donee are not necessarily contemporaneous and that the foregoing elements of an *inter vivos* gift are not essential where a trust is employed as the medium for effecting a transfer by gift.

We invite this Court's attention to the fact that the court below in an earlier case held to the contrary. See *McBrier* v. *Commissioner* (1939), 108 F. (2d) 967, wherein the court below stated:

> "Furthermore, it has been recognized that where a settlor has irrevocably transferred property to a trust reserving only the power of changing the beneficiary to persons other than himself, there is no taxable gift since the *cestuis que trust* are not finally determined and *a gift requires a definite donee.*"

We do not agree with the opinion of the court below in the instant cases as above quoted. It fails to recognize that the so-called "legal interest" or "property" which is the subject of the gift consists, upon analysis, of a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously. Where a trust is used as the medium for effecting a gift, the grantor may by separate acts part with portions of his interest or property, the subject of the transfer. He may first transfer the bare "legal title" to the trustee, reserving the income and the powers to alter, amend or revoke. From time to time thereafter he may terminate his power to revoke or he may modify his power to alter or his power to amend, or he may surrender his reservation of the income. By each act the grantor accomplishes the transfer of portions of his "legal interest" or "property". However, these acts do not re-

sult in a taxable gift until the grantor has parted with enough of his interest or property rights to fulfill the essential elements of a gift. The court below, therefore, has erred in assuming that the initial transfer of rights, privileges, powers and immunities by a settlor results in a taxable gift even though the donees are neither in existence nor ascertainable.

It is entirely possible that the eventual recipients of the remainders herein may be charitable institutions. If such is the case, a gift tax certainly could not attach to the transfers.

In further dispute of the correctness of the opinion of the court below that the completion of the transfer from the donor rather than the completion of the gift to particular donees is the decisive factor, we respectfully point out that Section 501 of the Revenue Act of 1932, as amended (*infra*, p. 31), which imposes the gift tax, refers neither to "donors" nor to "donees" but lays the tax upon "the transfer * * * by gift."

Other sections of the statute show that Congress contemplated that the "transfer * * * by gift" is a single transaction to which both the donor and the donee are parties. Section 504(b) (*infra*, p. 31) provides that in the case of gifts other than of future interests made "to any person by the donor" during the calendar year, the first $5,000 of such gifts "to such person" shall be excluded. While Section 509(a) (*infra*, p. 31) provides that the tax shall be paid by the donor, Section 510 (*infra*, p. 32) provides that if the tax is not paid when due, the donee shall be personally liable to the extent of the value of the gift.

In further argument against the conclusion that a gift took place upon the execution of the trust indentures by the Petitioners on January 14, 1936, we would propose the following query: Against whom could the provisions of Section 510 of the Revenue Act of 1932, as amended (*infra*, p. 32), which provides that the donee of any gift is made personally liable for any gift tax to the extent of the value of the gift if the tax is not paid by the donor, be invoked? The obvious answer is that Section 510 of the Revenue

Act would be ineffectual in aiding collection of the tax, since no donee was in existence from whom it could have been collected. This Court has stated that Section 510 indicates well that there must be a donee possessing something to tax.

In *Estate of Sanford* v. *Commissioner* (1939), 308 U. S. 39, 46, this Court stated:

> "There are other persuasive reasons why the taxpayer's contention cannot be sustained. By §§ 315(b), 324, and more specifically by § 510 of the 1932 Act, 26 USCA, § 559, the donee of any gift is made personally liable for the tax to the extent of the value of the gift if the tax is not paid by the donor. It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property, so incomplete that he might be deprived of it by the donor the day after he had paid the tax. Further, § 321(b)(1) exempts from the tax, gifts to religious, charitable, and educational corporations and the like. A gift would seem not to be complete, for purposes of the tax, where the donor has reserved the power to determine whether the donees ultimately entitled to receive and enjoy the property are of such a class as to exempt the gift from taxation. Apart from other considerations we should hesitate to accept as correct a construction under which it could plausibly be maintained that a gift in trust for the benefit of charitable corporations is then complete so that the taxing statute becomes operative and the gift escapes the tax even though the donor should later change the beneficiaries to the non-exempt class through exercise of a power to modify the trust in any way not beneficial to himself."

Anticipating the objection that a gift of the remainders under these trusts to the issue of Miss Robinson must be sustained since a contrary holding will violate the provisions of Regulations 79, Article 3 (*infra*, pp. 32-33), which provides in part that

> "• • • the tax is a primary and personal liability of the donor, is an excise upon his act of making

the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable",

it is only necessary to refer to the well-recognized rule of law that a regulation, in order to be valid, must not only be consistent with the statute, but it must be reasonable.

Manhattan General Equipment Co. v. *Commissioner* (1936), 297 U. S. 129;

Lynch v. *Tilden Co.* (1924), 265 U. S. 315, 320-322;

Miller v. *United States* (1935), 294 U. S. 435, 439-440;

International Railway Co. v. *Davidson* (1922), 257 U. S. 506, 514.

The provisions of the gift tax statute are unambiguous and its directions are specific. Therefore, if Article 3, Regulations 79, is so construed as to subject to gift tax a transfer to donees not then in existence, as is involved in the instant cases, then the regulation is both inconsistent with the statute and unreasonable, and constitutes an amendment of the gift tax statute which renders the regulation a mere nullity.

Lynch v. *Tilden Produce Co., supra;*

Koshland v. *Helvering* (1936), 298 U. S. 441;

Estate of Sanford v. *Commissioner, supra.*

We therefore respectfully submit that, there being no issue of Miss Robinson in existence on the date of the creation of the trusts, gifts of the remainders under said trusts could not have been effected as to such issues, and such remainders must be construed, as of that date, as being retained by each of the grantors subject to the power of testamentary appointment. There was no transfer *in praesenti* of any absolute interest in the remainders and accordingly the transfers of the remainders in trust did not effect a taxable gift.

C. The reservation by the petitioners of a possible power of appointment negatives the relinquishment in praesenti of dominion and control of the corpus or principal necessary to establish the purported gifts inter vivos.

Each of the irrevocable trust indentures created by the petitioners directed the Trustees on the termination of the life estates to pay over and distribute the corpus or principal of the respective trusts to the issue of Miss Robinson, to be divided among such issue *per stirpes* upon the attainment by such issue of the full age of twenty-one years, and in the event of a default of issue of Miss Robinson, to such persons, in such proportions and for such estates as Mrs. Robinette or Mr. Robinette or Miss Robinson, whichever of said three shall be the survivor, may by last will and testament, duly proved and allowed, direct, limit and appoint (R. 10, 16-17).

The remainder interests after the death of the life beneficiaries in each trust will either go to the issue of Miss Robinson or will pass under the will of the survivor of Mrs. Robinette, Mr. Robinette or Miss Robinson. On the date of the execution of the trusts, Mrs. Robinette was fifty-five years of age, Mr. Robinette was over fifty-five years of age and Miss Robinson was thirty years of age (R. 16). It would appear that, on a basis of the American Tables of Mortality, the probability is that Miss Robinson would survive her father and mother. The question here, however, is not one of the probabilities as to which way the remainder would go, but it is whether the petitioners made any gift in 1936 of the remainder interests under the trusts. *See Ithaca Trust Co.* v. *U. S.* (*supra*).

The trust instruments clearly evidence the fact that the remainder interests in the issue of Miss Robinson are wholly contingent upon (1) their birth and (2) their attainment of the full age of twenty-one years. Assuming that issue are born to Miss Robinson, then upon such issue attaining twenty-one years of age it will at that time be possible to ascertain the particular remaindermen who will take. If the issue do not reach the age of twenty-one

years, they will get nothing. Thus the transfers to the issue are to take effect in possession or enjoyment if at all only upon the attainment by such issue of the age of twenty-one years.

If the issue of Miss Robinson do not attain the age of twenty-one years, then the remainders are to pass under the will of the survivor of the three members of the family. If Miss Robinson is the survivor of the three, then all of the trust remainders, including those established by her, will pass under her will. It is also entirely possible that the trust remainders will pass under the will of Mrs. Robinette, including that established by her, if she should be the survivor.

In its decision herein the Board of Tax Appeals held (R. 18):

> "The remainder was to go to Elise's children upon their attaining the age of twenty-one, respectively; and, if no children, then to the appointee by will of the survivor of the three, the daughter, her mother, and her stepfather. Thus, as to each grantor, there was a possible power of testamentary disposition of the remainder—a power as substantial as a reversion would be. If, for example, Elise, being thirty and unmarried when her trust was created, should fail to have children and should survive her mother and stepfather, both of whom were substantially older, she would have a power of testamentary appointment. Because of this retained interest, whether vested or contingent, the trust property would be included in her gross estate subject to estate tax. She had not so completely disposed of the property by means of the trust as to avoid the estate tax. *Helvering* v. *Hallock*, 309 U. S. 106. Until children were born, as they were, the settlor still had a possible power of disposition of the remainder, which is one of the most important attributes of ownership. Upon her death, if there were no issue, her testamentary power of appointment would be exercised if she were the last survivor, or that power would be freed in the hands of her surviving mother or stepfather. So, when she created the trust she retained an interest in the property sufficient to warrar

the expectation that it would be included in her gross estate upon her death."

But the Circuit Court below rejected the decision of the Board on this point in the following language (R. 39-40):

"'Are *inter vivos* transfers in which the settlor has reserved to himself some reversionary interest subject to a gift tax as well? If the gift tax is merely supplementary to the estate tax, it is quite arguable that no gift tax can be imposed. These cases seem to be distinguishable, however, from the situation of the *Sanford* case, for reasons already outlined. A valuable irrevocable interest in another has been created by the settlor. There is no power in him to get it back; so long as the beneficiaries live, they will enjoy the income of the property, free from his control. Hence it seems that, to the extent of the value of the interests created in donee-beneficiaries, there is a taxable gift.' Magill, The Federal Gift Tax, 40 Columbia Law Review 773, 783, 787.

"We confess that we agree with these answers and further believe that the case at bar is embraced therein. The respondent settlors retained no economic control over the trusts except for the possibility that during the settlors' lifetime the life tenants die with the younger respondent remaining childless. Thus, the settlors could not themselves bring about the exercise of their powers of appointment without committing a crime. This view is supported by the recent opinion by Judge Frank in Commissioner *v.* Marshall and is the one taken by a tax expert writing in the Harvard Law Review:

"'It thus appears that such a reversionary interest in the grantor would not prevent the imposition of a gift tax. Certainly the transfer to a trustee of property over which the grantor only reserves a possibility of reverter (irrespective of its proximity or remoteness) constitutes such a transfer of property as is covered by the gift tax. If the gift tax is merely supplementary to the estate tax, of course no gift tax can be levied, but these trusts are distinguishable from

the trusts in the *Sanford* case because here the grantor reserved no economic control.' Warren, Correlation of Gift and Estate Taxes, 55 Harvard Law Review 1, 25."

The attention of this Court is respectfully directed to the use of the words "economic control" by the Circuit Court in the above quotation from its decision.

The Board has found herein (R. 16-18) that the respective grantors in each trust reserved life estates and testamentary powers of appointment over the remainders. Such reserved interests, we submit, constitute economic control within the meaning of the Gift Tax Law and the Estate Tax Law. 26 U. S. C. A. 811; *Helvering* v. *Hallock*, (1940) 309 U. S. 106; *Helvering* v. *Bullard*, (1938) 303 U. S. 297; *Helvering* v. *Mercantile Commerce B. & T. Co.*, (1940) 111 F. (2d) 224, cert. den. 310 U. S. 634.

In *Helvering* v. *Hallock* (*supra*), this Court held that a possibility of reverter was an interest sufficient to render the trust assets subject to an estate tax in the estate of the deceased grantor. The Board of Tax Appeals adopted the same view in its opinion herein (R. 18) when it said: "Because of this retained interest, whether vested or contingent, the trust property would be included in her gross estate subject to estate tax. She had not so completely disposed of the property by means of the trust as to avoid the estate tax."

The same thought was expressed by this Court in *Rasquin* v. *Humphreys* (1939) 308 U. S. 54 and in *Sanford's Estate* v. *Commissioner of Internal Revenue*, *supra*. In the *Sanford* case this Court stated (p. 44):

"There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that

it becomes subject to the estate tax upon its extinguishment at death."

Even Mr. Warren, cited by the Court below in its opinion of March 23, 1942, in his article on Correlation of Gift and Estate Taxes, 55 Harvard Law Review, recognizes the existence of a substantial economic control in these grantors and states the following on page 32 of that article:

> "E. *Trust with Reserved Life Estate and Testamentary Power of Appointment over Remainder.*—Similar to the *Sanford* case is the group of cases in which a grantor has created an irrevocable trust, reserving only the right to appoint the remainder after his life estate by will, and designating beneficiaries in default of appointment. In *Commissioner* v. *Chase National Bank*, the decedent created such an irrevocable trust from which she was to receive the income during her life, and thereafter the corpus was to be paid to her lawful descendants in such proportions as she should in her last will appoint, and in default of appointment, to named beneficiaries. Such a reserved power clearly constitutes economic control and causes the corpus of the trust to be included in the gross estate. It seems clear that until it is released, no transfer of property has been completed for gift tax purposes. This result is completely in accord with the principle of correlating the income, gift, and estate taxes, and the *Sanford* case presents no obstacle."

Since the decisions by this Court in the *Sanford* case (*supra*) and in the *Burnet* v. *Guggenheim* case (*supra*) it has been the generally accepted view that the Gift Tax is supplementary to the Estate Tax and that consequently a transfer is not to be taxed as a gift, if a grantor retains an interest in trust property, whether vested or contingent, sufficient to require the inclusion of the same in the grantor's gross estate subject to estate tax. In holding that the remainders herein are subject to gift tax the Court below has apparently rejected the heretofore accepted principles that the gift tax statute does not contemplate two taxes; and that a gift tax should not be imposed where it is evident

that the transferred property will be subjected to an estate tax.

These principles were forcefully expressed by this Court in the *Sanford* case (*supra*) at page 42 as follows:

> "The gift tax was supplementary to the estate tax. The two are in pari materia and must be construed together. Burnet *v.* Guggenheim, supra (288 U. S. 286, 77 L. ed. 751, 53 Ct. 369). An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter vivos which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death."

And in the same case at pages 45-47, this Court stated:

> "We think, as was pointed out in the Guggenheim Case, supra (288 U. S. 285, 77 L. ed. 751, 53 S. Ct. 369), that the gift tax statute does not contemplate two taxes upon gifts not made in contemplation of death, one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete."

In the light of the above cases we consider it appropriate to accentuate the fact that the reservation by a grantor of a life estate or a power of appointment such as is involved in the instant cases has been declared the occasion for the imposition of an estate tax upon the corpus of the trust (cf. 26 U. S. C. A., Sec. 811; *Helvering* v. *Bullard* (*supra*); *Helvering* v. *Mercantile-Commerce Bank & Trust Co.* (*supra*); *Helvering* v. *Hallock* (*supra*).

The natural implication to be derived from the decision of the court below in the instant cases and from the recent decisions of the First, Second and Fifth Circuit Courts in *Higgins* v. *Commissioner* (1942), 129 F. (2d) 237; *Commissioner* v. *Marshall* (1942), 125 F. (2d) 943, and *Commissioner* v. *McLean* (1942), 127 F. (2d) 942, respectively, is that the decision of this Court in the *Sanford* case should be confined to cases where the grantor has reserved the

power to "revoke" or "amend", and should be interpreted as only applicable to cases where the grantor's retained interest permitted him to "alter the flow of benefits."

In answer to such argument this Court stated in the *Sanford* case, *supra*, at page 47:

> "The argument of petitioner that the construction which the Government supports here, but assails in the Humphreys Case, affords a ready means of evasion of the gift tax is not impressive. It is true, of course, that under it gift taxes will not be imposed on transactions which fall short of being completed gifts. But if for that reason they are not taxed as gifts they remain subject to death taxes assessed at higher rates, and the Government gets its due, which was precisely the end sought by the enactment of the gift tax."

Under the correlation theory as expressed in the judicial decisions, the essential taxing element seized upon by the Treasury Department is the "string" retained by the grantor. The "string" may be of the hawser type; *i. e.*, a power to revoke or it may be of the thread size; *i. e.*, possibility of reverter; reserved control of investments, etc.

Under the income tax law, the income of an irrevocable trust payable to or for the use of named beneficiaries has been taxed to the grantor because of a "string" consisting of the grantor's reserved power to manage and direct investments of the trust. *Percy M. Chandler* v. *Commissioner* (1941), 119 F. (2d) 623. Under the estate tax law a remainder interest transferred under an irrevocable trust has been rendered taxable in the grantor's gross estate because of a "string" called "possibility of reverter," irrespective of its proximity or remoteness. *Helvering* v. *Hallock* (*supra*).

If, as its legislative history indicates, and if, as this Court decided in the *Sanford* case, the gift tax was designed as a complement and compensating tax to the estate tax, the transfers of the remainders here involved clearly cannot be subject to a gift tax since the "string" or interest retained by the grantors herein, irrespective of its proxim-

ity or remoteness has been declared the occasion for the imposition of an estate tax upon the corpus of the trust. (Cf. 26 U. S. C. A. Section 811; *Helvering v. Hallock, supra.*)

2. In any event, in computing the value of the remainders herein, allowance should be made for the value of the grantors' reversionary interests.

The failure of the court below to allow the grantors herein the right to deduct the value of their retained reversionary interests in computing the value of the remainders appears to be contrary to the provisions of the gift tax law, the Regulations and the judicial decisions which specifically exempt such interests from gift tax. This controversy is within narrow limits and presented only one issue to the Board and to the Circuit Court, *i. e.*, "whether the *remainder interests* under irrevocable *inter vivos* transfers in trust are taxable under Sections 501 *et seq.* of the Revenue Act of 1932, as amended * * *."

The Circuit Court below in its opinion of March 23, 1942 (R. 37-42) discusses and concedes the existence of reversionary interests in each of the grantors but concludes that such reversionary interests should not prevent the imposition of a gift tax. The court below, however, omitted to specify that the gift tax should attach only to the remainders after due allowance for the reversions.

On publication of the opinion of March 23rd, the grantors petitioned the court below for a rehearing, which petition was granted, and a reargument was had. The grantors pointed out to the court below on the reargument the evident error in its opinion of March 23rd. Subsequently that court in its opinion of July 30, 1942 (R. 50-51) stated as follows:

> "The taxpayers contend that at the least they are entitled to have the cases remanded to the Board to compute the value of the reversionary interest remaining in the grantor of each trust. This they contend must be deducted in order to furnish the proper determination of the value of the remainders. The Com-

missioner, on the other hand, contends that whatever either taxpayer has left by way of reversion is too contingent and remote to be valued. It is to be borne in mind that the question here is the valuation of the remainders created in each of these two deeds of trust. * * * The reversionary interests cannot in any way defer the time when the gifts will vest; nor can they defeat the latter. We think, therefore, that each of the respective settlors made such a gift as makes the whole taxable, subject, of course, to the reserved life estate. The cases do not need to be sent back for an evaluation of the reversionary interests."

The identical problem, concerning a valuation of the grantors' reversionary interests, confronted the Fifth Circuit Court of Appeals in the case of *Commissioner* v. *Marrs McLean* (1942), 127 F. (2d) 942. That case involved the execution of reciprocal trusts by husband and wife creating a life estate in a person other than the grantor and directed that the principal be distributed upon the death of the life tenant to the grantor's daughter; in the event the daughter predeceased the life tenant without issue, the principal was to be paid to the life tenant; if, however, the daughter predeceased the life tenant leaving issue, then the principal was to be paid to such issue upon the death of the life tenant. It was further provided that if none of such issue survived the life tenant or if the daughter, predeceased by the life tenant left no issue, then the trust was to revert to the grantor if he or she be living unless the daughter should leave a Will disposing of the trust estate, in which event the trust was to go as her Will directed.

HUTCHESON, *J.*, writing for that court, answered the same contention as made by the respondents in the instant cases as follows, at page 944:

"Upon the question of its value the Commissioner contends that the entire value of the property dealt with in the transfers is includable as taxable gifts for 1934, either because the possibility of reverter was too remote to justify placing any value on it or, as was the case in Hughes *v.* Commissioner, 9 Cir., 104 F. 2d 144, because its value was not shown.

With the first contention that the possibility of reverter was too remote to be valued we cannot agree, and there is even less merit in the second contention, that because it was not valued in the proofs, the Commissioner's valuation of the whole property must prevail in the face of our finding that the gift was not of the whole of it.

The Board stating 'perhaps the transfers effected completed gifts of some estates less than a fee,' correctly stated 'the (Commissioner's) determination was not made on that basis, the values necessary to any such determination are not in the record and no such issue is suggested by the parties.' The Commissioner, having valued the property on a different theory, may not ask that the value he gave to it without regard to the reservation, be taken as its value, giving due regard thereto.

The judgment of the Board while affirmed as to the 1933 taxes will be reversed as to those for 1934 and the cause as to those taxes will be remanded to it with instructions to value the estates transferred by the 1934 gift in trust, and redetermine the deficiencies accordingly."

The *Hughes* v. *Commissioner* case referred to in the above-quoted opinion of the Fifth Circuit, also found that such valuations should have been deducted in computing the value of the remainders. In that case, the court, in considering the taxpayer's contention that, since Section 506 of the Revenue Act of 1932 provides that if "the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift," only the value of the interest in the property transferred should be included in the return and the value of the interest in the property transferred, which he retained, should be excluded from the amount of the gift, stated as follows, at page 148:

"Such value should have been deducted from the value of the securities transferred, but there was no evidence of such value submitted to the Board."

There is no question in the instant case as to evidence of the value of the reversionary interests. The court below in its opinion of July 30th (R. 51) stated:

> "According to the Regulations it is made on the basis of the 'present value of $1 due at the end of the year of death of a person of specified age'. Such an evaluation is a matter of calculation from the facts and figures already in the record in these cases."

Thus in the instant cases the court below held the entire corpus of the trusts, after deduction of the primary life estates, subject to gift tax without excluding the value of the grantors' reversionary interests whereas the gift tax law, the Regulations promulgated thereunder (Regulations 79, Art. 19(7), *infra*, p. 34) and the judicial decisions above quoted direct the exclusion of the value of the reversionary interests in computing the value of the remainders as such for gift tax purposes.

We, therefore, respectfully submit that, if this Court is of the opinion that the remainder interests transferred under the instant trusts constituted taxable gifts within the meaning of the pertinent provisions of the Revenue Act of 1932, as amended, then in rendering its decision this Court should direct that the cases be returned to the Board of Tax Appeals (now the Tax Court of the United States) with instructions to the Board to value the reversionary interests retained by the grantors herein, and to redetermine the deficiencies accordingly.

Conclusion

The decision of the Circuit Court of Appeals for the Third Circuit should be reversed.

Dated, New York City, December 24, 1942.

Respectfully submitted,

HENRY A. MULCAHY,
GUILFORD S. JAMESON,
Counsel for the Petitioners.

Appendix

REVENUE ACT OF 1932, C. 209, 47 STAT. 169

SECTION 501:

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

"(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act."

SECTION 503:

"Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

SECTION 504(b):

"*Gifts less than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year."

SEC. 509(a):

"*Time of payment.*—The tax imposed by this title shall be paid by the donor on or before the 15th day of March following the close of the calendar year."

SECTION 510:

"The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift sold by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien herein imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after-acquired property) except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth. If the Commissioner is satisfied that the tax liability has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all of the property from the lien herein imposed."

TREASURY REGULATIONS 79 (1936 ED.) PROMULGATED UNDER THE REVENUE ACT OF 1932, AS AMENDED BY THE REVENUE ACTS OF 1934 AND 1935:

ART. 3:

"*Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

"As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal

and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. A donor shall be considered as having the power to revest in himself the beneficial title to the property transferred if he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the property or the income therefrom. A trustee, as such, is not a person having a substantial adverse interest in the disposition of the trust property or the income therefrom. The relinquishment or termination of the power, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the formal transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the donor's power to receive it himself, and constitutes a gift of such income or of such other enjoyment taxable in the calendar year of its receipt.

"If the donor contends that a power retained by him constitutes beneficial dominion and control, and that by reason thereof the transfer is not in substance a gift, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument by which the transfer was made, should be submitted."

ART. 8:

"*Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of

property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift."

ART. 19(7):

"* * *

"If the gift is of a remainder or reversionary interest subject to an outstanding life estate, the value of the gift will be obtained by multiplying the value of the property at the date of the gift by the figure in column 3 of Table A opposite the number of years nearest to the age of the life tenant. In case the remainder or reversion is subject to an estate for a term of years, Table B should be used."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 499

META BIDDLE ROBINETTE, *Petitioner,*

against

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

No. 500

ELISE BIDDLE PAUMGARTEN, *Petitioner,*

against

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR THE PETITIONERS.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR THE PETITIONERS.

Distinguishing the Case of Humes v. United States, 276 U. S. 487.

The Humes case involved the valuation under estate tax liability on a contingent interest in a residuary estate transfer to charity.

The niece, who was the primary remainderman, being in existence at the date of the decedent's death, received a

vested interest in the entire remainder which was distributable to her in specified portions upon her attaining the ages of 30, 35 and 40. The vested interest thus transferred to her could only be divested if she should die without issue before attaining the age of 40, in which event the undistributed principal was to be distributed to the contingent charitable interests.

There was no question raised in the Humes case as to the possibility of valuing the girl's vested remainder interest. The argument and the decision related only to the valuation of the charitable contingent interests.

In the instant cases, remainder interests on the date of the creation of the trusts could not have been transferred to the issue of Miss Robinson not then in existence, and as of that date the only interests in existence with respect to such remainders were those vested interests retained by the grantors and secondary life tenants which can be, as the respondent maintains on page 6 of his brief, computed by methods similar to those employed in the Smith case.

The Humes case is therefore applicable to the instant cases only in so far as the valuation of the contingent interests in the issue of Miss Robinson are concerned, and if so restricted and construed we have no quarrel with the Humes case. We maintain that on the date of the transfers herein Miss Robinson's issue could receive nothing of value, and the entire remainders were therefore retained by the respective grantors subject to their powers of appointment.

Moreover, the contingent interests of Miss Robinson's issue in these cases being incapable of evaluation under the Humes case, and the respondent not having sustained the presumption in favor of the correctness of his determination, the burden was on him to prove the corrected value of the reduced remainders or property transferred.

In these cases the taxpayers filed gift tax returns disclosing the execution of the trusts and claimed there was no gift tax liability. The Commissioner then determined that

the transfer of the entire remainder interests under the Indentures constituted gifts.

There are innumerable decisions to the effect that the Commissioner's determination is presumed to be correct. This presumption, however, is rebuttable, and in the instant cases was rebutted by the taxpayers in the proceedings before the Board, in which proceedings the Commissioner's determination was reversed. At that point it became incumbent upon the Commissioner to show and prove that although the taxpayers did not make a gift in the amount originally determined by him, nevertheless they did make a gift in a lesser amount, the computation of which he should then have proceeded to prove. (This was pointed out by the C. C. A. Fifth in the McLean case, our brief p. 28.)

One of the items to be proved in supporting his amended or corrected determination would necessarily be the basis of his deficiency, i.e. the value of the contingent interests transferred to the issue of Miss Robinson as opposed to the value of the reversionary interests retained by the taxpayers. It being agreed by all parties concerned that the Humes case is good law, and that it effectively removes the possibility of valuing the contingent interests of the issue under the trusts, then the entire remainders must be considered as having been retained by the grantors subject to their reversionary interests, since no part thereof can be allocated to the issue's contingent interest.

CONCLUSION.

The decision of the Circuit Court of Appeals for the Third Circuit should be reversed and the decision of the Board of Tax Appeals should be affirmed.

Respectfully submitted,

HENRY A. MULCAHY,
GUILFORD S. JAMESON,
Counsel for Petitioners.

FILE COPY

Nos. 499-500

In the Supreme Court of the United States

OCTOBER TERM, 1942

META BIDDLE ROBINETTE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ELISE BIDDLE PAUMGARTEN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

CITATIONS

Cases:

Statute:

Miscellaneous:

In the Supreme Court of the United States

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

These cases were consolidated for hearing and opinion in the Board of Tax Appeals and the court below. The opinion of the Board of Tax

Appeals (R. 4–9) is reported in 44 B. T. A. 701. The opinions of the Circuit Court of Appeals on hearing (R. 20–26) and rehearing (R. 39–42) are reported in 129 F. 2d 832.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 23, 1942 (R. 27–28). Petition for rehearing filed April 7, 1942 (R. 29), was granted April 21, 1942 (R. 37). On July 30, 1942, the court affirmed its previous order reversing the decisions of the Board (R. 39–42). The petition for writs of certiorari was filed October 29, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Where the settlor of a trust provides that the income is to be paid to the settlor for life, then to two others for life, the property then to go to children, if any, when they reach twenty-one, or if none, then to testamentary appointees of the survivor of the settlor and the two life tenants, is the settlor subject to gift tax under Sections 501 and 506 of the Revenue Act of 1932 upon the value of the remainder at the time of establishment of the trust?

2. Whether the grantor retained any interest other than her life estate which should be excluded in determining the value of the gift.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra*, pp. 9–13.

STATEMENT

The Board of Tax Appeals found the following facts (R. 4–7):

Elise Biddle Paumgarten was, before her marriage, Elsie Biddle Robinson. She is the daughter of Meta Biddle Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan, the trust indentures were executed on January 14, 1936, by the mother and daughter in the presence of all three.

The stepfather's will had been executed shortly before. (R. 4–5.)

Taxpayer Meta Biddle Robinette, who was then fifty-five years old, executed an irrevocable trust indenture, the Pennsylvania Company for Insurances on Lives & Granting Annuities, Edward B. Robinette, and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $193,546. The trustees were to pay the entire income to the grantor during her life, and on her death to her husband monthly, and on his death, to her daughter monthly for life. Upon the termination of the life estates, the trustees were to distribute the corpus to the issue of the daughter *per stirpes*, upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons, in such proportions, and for such estates as the survivor of the three should by will appoint. (R. 5.)

Taxpayer Elise Biddle Robinson, who was then 30 years old, executed an irrevocable trust indenture, the Girard Trust Company, Edward B. Robinette, and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $680,928.68. The trustees were to pay the entire income from the trust to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either, to the

survivor. Upon termination of the life estates, the trustees were to distribute the corpus to the issue of the grantor *per stirpes,* upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons, and in such proportions, and for such estates as the survivor of the three should by will appoint. Elise Biddle Robinson was married in April of 1936 and now has issue. (R. 5–6.)

At the same time, this taxpayer executed an irrevocable trust indenture, the Pennsylvania Company for Insurances on Lives & Granting Annuities, Edward B. Robinette, and George Earle Robinette being the trustees. The terms were identical with the Girard trust aforementioned, except as to the amount and classification of the properties. To the trustees she transferred property having a market value of $216,709.16. (R. 6.)

The taxpayers' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures of January 14, 1936, and claimed there was no gift tax liability (R. 6).

The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at $57,958.40, and assessed a tax of $388.75 against her, which she paid about January 29, 1940. The Commissioner determined that the

life estates transferred to the mother and stepfather were gifts by Elise Biddle Robinson, valued them at $48,635.52, and assessed a tax of $129.53 against her, which she paid about January 29, 1940. (R. 6–7.)

Thereafter, the Commissioner issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 14, 1936, were gifts, and determining an additional deficiency of $3,155.57 against Meta Biddle Robinette and $25,044.94 against Elise Biddle Robinson (R. 7).

The value of the remainder in the Meta Biddle Robinette trust was fixed by the Commissioner at $104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by the Commissioner at $274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred (R. 7).

Upon review the Board of Tax Appeals held (R. 9) that the remainder interests did not constitute taxable gifts but the court below reversed the decision of the Board (R. 27–28).

DISCUSSION

1. The first question is substantially similar to the one in *Smith* v. *Shaughnessy*, 128 F. 2d 742

(C. C. A. 2d), and since the taxpayer's petition for certiorari was granted in that case on November 9, 1942, No. 429, present term, we do not oppose the granting of the petition here.

2. Neither do we oppose the granting of the petition as to the question whether some allowance should be made for the grantors' reversionary interests in calculating the value of the remainders. The court below held, correctly, we believe, that no such allowance need be made. On the other hand, in somewhat similar circumstances, the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean*, 127 F. 2d 942, held that the grantor's reversionary interest was not too remote to be valued and remanded the case to the Board with directions to determine its value and reduce the value of the gift accordingly.[1] It is our view that interests of this character may be too remote and speculative to be taken into consideration for purposes of the gift tax. Cf. *Humes* v. *United States*, 276 U. S. 487. However, since the issue is related to the basic question already before the Court, it would be helpful in the administration of the statute to

[1] In the *McLean* case the grantor reserved a possibility of reverter if he should survive his wife, his daughter, and any children and grandchildren of the daughter unless she should make a will disposing of the trust estate, in which event the trust estate was to go as her will directed.

have the entire matter authoritatively determined by this Court.

Respectfully submitted.

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SEWALL KEY,
L. W. POST,
Special Assistants to the Attorney General.

NOVEMBER 1942.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *.

* * * * * *

SEC. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

Treasury Regulations 79 (1936 ed.):

ART. 2. *Transfers reached.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Thus, for example, a taxable transfer may be effected by the declaration of a trust, * * *. Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are donatively passed or

conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. * * *

* * * * * * *

ART. 3 [as amended by T. D. 5010, 1940–2 Cum. Bull. 293]. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and their scope determined.

A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in him-

self. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life where, by an exercise of the power, the estate may be terminated or cut down to one of less value, and without restriction upon the extent to which the estate may be so cut down, constitutes an incomplete gift. Modifying the example by treating the power as confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete.

A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.

A donor shall be considered as himself having the power where it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. A trustee, as such, is not a person having an adverse interest in the disposition of the trust property or its income.

The relinquishment or termination of a power to change the disposition of the transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the initial transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the power, and constitutes a gift of such income or of such other enjoyment taxable as of the calendar year of its receipt.

If the donor contends that the power is of such nature as to render the gift incomplete, and hence not subject to the tax as of the calendar year of the initial transfer, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument of transfer, should be submitted.

* * * * *

ART. 17. *Gifts made in property.*—A gift made in property is subject to the tax in the same manner as a gift of cash, and the amount of the gift is the value of the property at the date of the gift.

* * * * *

ART. 19. *Valuation of property.*— * * *

* * * * *

If the gift is of a remainder or reversionary interest subject to an outstanding life estate, the value of the gift will be obtained by multiplying the value of the property at

the date of the gift by the figure in column 3 of Table A opposite the number of years nearest to the age of the life tenant. In case the remainder or reversion is subject to an estate for a term of years, Table B should be used.

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Nos. 499-500

In the Supreme Court of the United States

OCTOBER TERM, 1942

META BIDDLE ROBINETTE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ELISE BIDDLE PAUMGARTEN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 499

META BIDDLE ROBINETTE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 500

ELISE BIDDLE PAUMGARTEN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

These cases were consolidated for hearing and opinion in the Board of Tax Appeals and the court below. The opinion of the Board of Tax Appeals (R. 15–19) is reported in 44 B. T. A. 701. The original opinion of the Circuit Court of Ap-

peals (R. 37–42) and its opinion upon rehearing (R. 50–52) are reported in 129 F. 2d 832.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 23, 1942. (R. 42, 43.) Petition for rehearing, filed April 7, 1942 (R. 43), was granted April 21, 1942 (R. 48). On July 30, 1942, the court affirmed its previous order reversing the decisions of the Board. (R. 50–52.) The petition for writs of certiorari was filed October 29, 1942, and was granted December 7, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Where the grantor of a trust provides that the income is to be paid to the grantor for life, then to two others for life, the property then to go to children, if any, when they reach twenty-one, or if none, then to testamentary appointees of the survivor of the grantor and the two other life tenants, is the settlor subject to gift tax under Sections 501 and 506 of the Revenue Act of 1932 upon the value of the remainder (after the life estate) at the time of establishment of the trust?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix to the Government's brief in *Smith* v. *Shaughnessy*, No. 429, present term, which is to be argued immediately preceding the instant case and involves similar issues.

STATEMENT

The Board of Tax Appeals found the following facts (R. 15–17):

Elise Biddle Paumgarten was, before her marriage, Elise Biddle Robinson. She is the daughter of Meta Biddle Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan, the trust indentures were executed on January 14, 1936, by the mother and daughter in the presence of all three. The stepfather's will had been executed shortly before. (R. 15–16.)

Taxpayer Meta Biddle Robinette, who was then fifty-five years old, transferred property having a market value of $193,546 irrevocably in trust to

pay the entire income to herself for life, and on her death to her husband for life, and on his death, to her daughter for life. Upon the termination of the life estates, the trustees were to distribute the corpus to the issue of the daughter *per stirpes*, upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons as the survivor of the three should by will appoint. (R. 16.)

Taxpayer Elise Biddle Robinson, who was then 30 years old, transferred property having a market value of $680,928.68, irrevocably in trust to pay the entire income to herself for life, and on her death to pay the income to her mother and her stepfather, in equal shares, and on the death of either, to pay the entire income to the survivor. Upon termination of the life estates, the trustees were to distribute the corpus to the issue of the grantor *per stirpes*, upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons as the survivor of the three should by will appoint. Elise Biddle Robinson was married in April of 1936 and now has issue. (R. 16.) At the same time, she also transferred other property, having a market value of $216,709.16, irrevocably in trust subject to substantially the same terms described above. (R. 17.)

The taxpayers' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures of January 14,

1936, and claimed there was no gift tax liability. (R. 17.)

The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at $57,958.40, and assessed a tax of $388.75 against her, which she paid about January 29, 1940. The Commissioner determined that the life estates transferred to the mother and stepfather were gifts by Elise Biddle Robinson, valued them at $48,635.52, and assessed a tax of $129.53 against her, which she paid about January 29, 1940. (R. 17.)

Thereafter, the Commissioner issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 14, 1936, were gifts, and determining an additional deficiency of $3,155.57 against Meta Biddle Robinette and $25,044.94 against Elise Biddle Robinson. (R. 17.)

The value of the remainder in the Meta Biddle Robinette trust was fixed by the Commissioner at $104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by the Commissioner at $274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred[1] (R. 17).

[1] The remainder factors, referred to above, were apparently taken from Regulations 79 (1936 ed.), Article 19, Table A, column 3.

Upon review the Board of Tax Appeals held (R. 17–19) that the remainder interests did not constitute taxable gifts but the court below reversed the decision of the Board (R. 37–43, 50–52).

ARGUMENT

The basic issue herein is substantially the same as in *Smith* v. *Shaughnessy*, No. 429, and we respectfully refer the Court to our brief in that case for a full presentation of our position. There are, however, two additional aspects to the instant cases that require further comment.

1. In *Smith* v. *Shaughnessy*, the donor retained a substantial reversionary interest, depending only upon his surviving his wife and capable of ascertainment by standard actuarial methods; we therefore conceded that the value of that reversionary interest might be excluded from the measure of the taxable gift. In the instant cases, on the other hand, the reversionary interests depend not only upon the possibility of survivorship (which probably could be computed by methods similar to those employed in the *Smith* case), but also upon death of the daughter without issue.[1]

[1] Actually, the condition was even more complex, for it involved the death of the daughter without issue who reached the age of twenty-one.

The instant trusts were clearly valid under local law even though the remainders were to go to persons unborn at the time the trusts were created. *King* v. *York Trust Co.*, 278 Pa. 141; *Lewis's Estate*, 231 Pa. 60; *Johnson* v. *Provident Trust Co. of Philadelphia*, 280 Pa. 255; *McCormick* v.

We know of no generally accepted actuarial methods whereby so remote a contingency can be computed.'

The relationship of these cases to the *Smith* case is analogous to the relationship between *Humes* v. *United States*, 276 U. S. 487, and *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. In the *Humes* case, there was a bequest of property to a girl, then 15 years of age, to be distributed to her in specified portions upon her attaining the ages of 30, 35, and 40, respectively; and it was provided that if she should die without issue before attaining the age of 40, the undistributed principal was to be paid to charities. The question in the case was whether the decedent's estate was entitled to a charitable deduction measured by an estimated value of the charities' contingent interest in the property. The Court held that any valuation of that interest would be so speculative (in view of the condition that the primary legatee die without

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Sypher, 238 Pa. 185; *Ashhurst* v. *Given*, 5 Watts & S. 323 (Pa.); see also American Law Institute, Restatement of the Law of Trusts, Section 112, Comment d.

'The trusts herein were established in contemplation of the daughter's marriage, and it is the general rule that a woman is presumed to be capable of bearing children (*Sterrett's Estate*, 300 Pa. 116; *List* v. *Rodney*, 83 Pa. 483). The instant case presents no facts (*United States* v. *Provident Trust Co.*, 291 U. S. 272; *City Bank Farmers' Trust Co.* v. *United States*, 74 F. 2d 692 (C. C. A. 2d)), which would take it out of the general rule. Elise was 20 years old when the trusts were created, she was married a few months thereafter and children were in fact born to her.

issue), that Congress could not be presumed to have intended to allow the deduction in such circumstances.

In the *Ithaca Trust Co.* case, however, where a bequest was made to the decedent's wife for life, with remainder to charities, it was held that the charities' interest was sufficiently ascertainable to justify the deduction.*

The *Smith* case is comparable to the *Ithaca Trust Co.* case, for in each the remainder interest was capable of ascertainment by recognized acturial methods; we therefore conceded that the retained interest of the grantor may be excluded in the *Smith* case. The instant cases, on the other hand, are comparable to the *Humes* case, since the donors' contingent reversionary interests depend not only upon conditions of survivorship, but also upon failure to leave issue. Any attempt to value these remote interests would be, in the language of Mr. Justice Brandeis, "mere speculation bearing the delusive appearance of accuracy" (*Humes* v. *United States*,

* The bequest also authorized the wife to use any sum from principal "that may be necessary to suitably maintain her in as much comfort as she now enjoys." But the Court pointed out that the widow's right to take corpus was not left to her discretion; it was based upon an ascertainable standard "fixed in fact and capable of being stated in definite terms of money," 279 U. S. at 154. And since the property involved could produce more income than was sufficient to maintain the widow as required, the Court apparently felt that this factor could be disregarded.

at p. 494), and it therefore cannot be supposed that Congress intended such interests to be excluded in the computation of the gift tax liability.

Although the court reached a contrary conclusion with respect to a contingent interest that was similarly remote and conjectural in *Commissioner* v. *McLean*, 127 F. 2d 942 (C. C. A. 5th),[1] we submit that the case was erroneously decided in that respect. Moreover, the burden was on the taxpayer to prove what, if any, value should be accorded to the retained interest (*Hughes* v. *Commissioner*, 104 F. 2d 144, 147–148 (C. C. A. 9th)) and there is no basis in this record for overriding the Commissioner's determination. Here the Commissioner determined that the full value of the remainders, as computed by actuarial methods, should be included in the taxable gifts and the taxpayers have failed to overcome the presumption of correctness which attaches to such a determination. Cf. *Wickwire* v. *Reinecke*, 275 U. S. 101; *Reinecke* v. *Spalding*, 280 U. S. 227; *Burnet* v. *Houston*, 283 U. S. 223; *Fidelity-Philadelphia*

[1] In the *McLean* case the grantor reserved a possibility of regaining the property if he should survive his wife, his daughter, and any children and grandchildren of the daughter unless she should make a will disposing of the trust estate, in which event the trust estate was to go as her will directed. The court remanded the case to the Board with directions to evaluate that very remote interest and reduce the value of the gift accordingly.

Trust Co. v. *Commissioner*, 27 B. T. A. 972, 979–980.

2. In their brief on the merits, petitioners make the further contention that the transfers herein were not taxable because, in view of their reciprocal character, they were made "for an adequate and full consideration in money or money's worth" (Br. 7 *et seq.*). Although petitioners had raised this issue below, they did not present it in their petition for certiorari, and the Government's response to the petition, consenting to certiorari, accordingly ignored it. We submit, therefore, that under this Court's rules of practice, often restated, this issue is not open to petitioners.

Moreover, the point is wholly without merit. The statute contemplates the taxation of transfers for less than full and adequate consideration in money or money's worth. Revenue Act of 1932, Section 503; Treasury Regulations 79 (1936 ed.), Article 8. The trusts in these cases were the instrumentalities by which the grantors disposed of their property by way of gift. The gifts were none the less real because of the concerted action with respect thereto. Such arrangements do not detract from the essential quality of a transfer in trust (cf. *Lehman* v. *Commissioner*, 109 F. 2d 99 (C. C. A. 2d); *Commissioner* v. *Bravo*, 119 F. 2d 97 (C. C. A. 3d); *Commissioner* v. *Warner*, 127 F. 2d 913 (C. C. A. 9th)); or make that a sale which is in reality a gift. Cf. *Taft* v. *Commis-*

sioner, 304 U. S. 351. Certainly the taxpayers here have failed to sustain the burden of proving that the respective transfers were made for consideration which was adequate and full and for money or money's worth. Cf. *Commissioner* v. *Bristol*, 121 F. 2d 129 (C. C. A. 1st).

Although it may be assumed *arguendo* that the life estate which one donor gave the other could operate *pro tanto* to offset the life estate received from the other, there was no consideration in money or money's worth with respect to the remainder interests here in question.

CONCLUSION

The judgments of the court below should be affirmed.

Respectfully submitted.

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JANUARY 1943.

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p. 2

SUPREME COURT OF THE UNITED STATES.

Nos. 499 and 500.—October Term, 1942.

Meta Biddle Robinette, Petitioner, 499 *vs.* Guy T. Helvering, Commissioner of Internal Revenue. Elise Biddle Paumgarten, Petitioner, 500 *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 15, 1943.]

Mr. Justice Black delivered the opinion of the Court.

This is another case[1] under the gift tax provisions of the Revenue Act of 1932, §§ 501, 506, which, while presenting certain variants on the questions decided today in *Smith* v. *Shaughnessy*, No. 429, is in other respects analogous to and controlled by that case.

In 1936, the petitioner, Elise Paumgarten (nee Robinson), ~~Biddle Robinson~~, was thirty years of age and was contemplating marriage; her mother, Meta Biddle Robinette, was 55 years of age and was married to the stepfather of Miss Robinson. The three, daughter, mother and stepfather, had a conference with the family attorney, with a view to keeping the daughter's fortune within the family. An agreement was made that the daughter should place her property in trust, receiving a life estate in the income for herself, and creating a second life estate in the income for her mother and stepfather if she should predecease them. The remainder was to go to her issue upon their reaching the age of 21, with the further arrangement for the distribution of the property by the will of the last surviving life tenant if no issue existed. Her mother created a similar trust, reserving a life estate to herself and her husband and a second or contingent life estate to her daughter. She also

[1] These two matters have been considered as one case below and will be so treated here.

assigned the remainder to the daughter's issue. The stepfather made a similar arrangement by will. The mother placed $193,000 worth of property in the trust she created, and the daughter did likewise with $680,000 worth of property.

The parties agree that the secondary life estates in the income are taxable gifts, and this tax has been paid. The issue is whether there has also been a taxable gift of the remainders of the two trusts. The Commissioner determined that the remainders were taxable, the Board of Tax Appeals reversed the Commissioner, and the Circuit Court of Appeals reversed the Board of Tax Appeals. 129 F. 2d 832.

The petitioner argues that the grantors have not relinquished economic control and that this transaction should not be subject both to the estate and to the gift tax. What we have said in the *Smith* case determines these questions adversely to the petitioner. However, the petitioners emphasize certain other special considerations.

First. Petitioner argues that since there were no donees in existence on the date of the creation of the trust who could accept the remainders, the transfers cannot be completed gifts. The gift tax law itself has no such qualifications. It imposes a tax "upon the transfer . . . of property by gift." And Treasury Regulations provide that "The tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable." We are asked to strike down this regulation as being invalid because inconsistent with the statute. We do not think it is. As pointed out in the *Smith* case, the effort of Congress was to reach every kind and type of transfer by gift. The statute "is aimed at transfers of the title that have the quality of a gift." *Burnet* v. *Guggenheim*, 288 U. S. 280, 286. The instruments created by these grantors purported on their face wholly to divest the grantors of all dominion over the property; it could not be returned to them except because of contingencies beyond their control. Gifts of future interests are taxable under the Act, § 504(b) and they do not lose this quality merely because of the indefiniteness of the eventual recipient. Tht petitioners purported to give the property to someone whose identity could be later ascertained and this was enough.

Second. It is argued that the transfers were not gifts but were supported by "full consideration in money or money's worth."[2] This contention rests on the assumption that an agreement between the parties to execute these trusts was sufficient consideration to support the transfers. We need not consider or attempt to decide what were the rights of these parties as among themselves. Petitioners think that their transaction comes within the permissive scope of Article 8 of Regulation 79 (1936 edition) which provides that "a sale, exchange or other transfer of property made in the ordinary course of business (a transaction which is bona fide at arm's-length and free from any donative intent) will be considered as made for an adequate and full consideration in money or money's worth." The basic premise of petitioner's argument is that the moving impulse for the trust transaction was a desire to pass the family fortune on to others. It is impossible to conceive of this as even approaching a transaction "in the ordinary course of business."

Third. The last argument is that "in any event, in computing the value of the remainders herein, allowance should be made for the value of the grantor's reversionary interest." Here unlike the *Smith* case the government does not concede that the reversionary interest of the petitioner should be deducted from the total value. In the *Smith* case, the grantor had a reversionary interest which depended only upon his surviving his wife, and the government conceded that the value was therefore capable of ascertainment by recognized actuarial methods. In this case, however, the reversionary interest of the grantor depends not alone upon the possibility of survivorship but also upon the death of the daughter without issue who should reach the age of 21 years. The petitioner does not refer us to any recognized method by which it would be possible to determine the value of such a contingent reversionary remainder. It may be true as the petitioner argues that trust instruments such as these before

[2] Section 503 of the 1932 Act, 47 Stat. 169, provides that "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, ..." This language is interpreted in the House and Senate Committee Reports as follows: "The tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth." House Report No. 708, 72d Cong., 1st Sess., p. 29; Senate Report No. 665, 72d Cong., 1st Sess., p. 41.

us frequently create "a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously." But before one who gives this property away by this method is entitled to deduction from his gift tax on the basis that he had retained some of these complex strands it is necessary that he at least establish the possibility of approximating what value he holds. Factors to be considered in fixing the value of this contingent reservation as of the date of the gift would have included consideration of whether or not the daughter would marry; whether she would have children; whether they would reach the age of 21; etc. Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question. *Humes* v. *United States*, 276 U. S. 487, 494.

The judgment of the Circuit Court of Appeals is

Affirmed.

Mr. Justice ROBERTS dissents for the reasons set forth in his opinion in No. 429, *Smith* v. *Shaughnessy*.

A true copy.

Test:

Clerk, Supreme Court, U. S.